Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

GEORGE STUART, Secretary, as Head of the Florida Department of Business and Professional Regulation and JOHN P. BAUMANN, JR., CHARLES H. CALHOUN, SHAUN M. DAVIS, MALCOLM R. DUGGAN, MIRTHA V. MARTIN, FRANCISCO J. PAREDES, ANDREA A. SPOTTSWOOD, DAVID MACNAMARA and ZOYA W. PHILLIPS, in their official capacities as Members of the Florida Board of Accountancy,

Petitioners,

vs.

AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC., a Delaware Corporation and STEPHEN M. MILLER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Florida's regulation of nonexpressive conduct governing the practice of public accounting is required to meet First Amendment standards simply because Florida defines the practice of public accounting as "holding out" that a person has a state license as a "CPA" when performing certain accounting services?

2. Whether the State of Florida can condition a state licensee's use of a state created title, "CPA", on compliance with the statutes and rules governing nonexpressive conduct in the practice of public accounting without implicating or violating the First Amendment?

3. Whether "holding out" that an individual has a state license to practice public accounting ("CPA"), and providing certain public accounting services while intentionally violating the state's regulatory requirements governing the practice of public accounting is false and misleading?

4. Whether, if the First Amendment is implicated, the State of Florida regulatory scheme for the practice of public accounting is narrowly tailored and meets the *Central Hudson* test?

LIST OF PARTIES

The following parties were plaintiffs below and are the Respondents before this Court:

> AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC., a Delaware Corporation, and STEPHEN M. MILLER.

The following parties were defendants below and are the Petitioners before this Court:

> GEORGE STUART, Secretary, as Head of the Florida Department of Business and Professional Regulation and JOHN P. BAUMANN, JR., CHARLES H. CALHOUN, SHAUN M. DAVIS, MALCOLM R. DUGGAN, MIRTHA V. MARTIN, FRANCISCO J. PAREDES, ANDREA A. SPOTTSWOOD, DAVID MACNAMARA, and ZOYA W. PHILLIPS, in their official capacities as Members of the Florida Board of Accountancy.

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The Petitioners, George Stuart, *et al.*, respectfully request that the Court issue a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered in this action.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") is reported at 117 F.3d 1376 (11th Cir. 1997), and is reproduced at Pet. App. A, *infra*, 1a. The opinion of the United States District Court for the Northern District of Florida is unreported and is reproduced at Pet. App. B, *infra*, 21a. The opinion of the Court of Appeals for the Ninth Circuit that conflicts with the decision in this case (Pet. App. C, *infra*, 62a) is reported at 72 F.3d 1427 (9th Cir. 1995).

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit was entered on July 30, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment of the United States Constitution and Sections 473.302(5), 473.309, 473.3101 and 473.322, Florida Statutes (1995), all of which are reprinted in the Appendix to this Petition. *See* Pet. App. D, *infra*, 76a.

STATEMENT OF THE CASE

Section 473.309, Florida Statutes[1], regulates conduct and requires a corporation that practices public accounting to be controlled by persons who are licensed as certified public accountants ("CPA"). Section 473.3101, Florida Statutes, regulates conduct and requires a corporation that practices public accounting to be licensed by the Board as a CPA firm. Neither statute bans or regulates speech or expression.

Nevertheless, the court below applied First Amendment scrutiny to these statutes and affirmed a lower court decision enjoining the State of Florida from enforcing them. The Eleventh Circuit's decision conflicts with a recent decision by the Ninth Circuit. Petitioners seek a writ of certiorari to resolve the conflict between the circuits and clarify the application of the First Amendment to state regulation of the conduct of the "practice of public accountancy."

A. Florida's Regulation Of The Practice Of Public Accountancy

Florida regulates the "practice of public accountancy" through Chapter 473, Florida Statutes, and related administrative

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1. At the time the decision below was rendered, Section 473.309, Florida Statutes, required that a corporation practicing public accounting be a professional services corporation owned solely by licensed CPAs. This section was amended during the 1997 legislative session to eliminate the professional service corporation requirement and to reduce the CPA ownership/control requirement to two-thirds. *See* 1997 Fla. Sess. Law Serv. 151 (West). The statute's amendment does not moot this case, because, as a publicly traded company, American Express does not and cannot meet the requirements of the current statute. Section 473.309, Florida Statutes, as amended in 1997, is included in the Appendix to this Petition at 80a-83a.

rules. Florida's regulatory framework seeks to ensure the integrity, competency, independence, and objectivity of CPAs when they provide public accounting services. *See* Fla. Stat. § 473.301 (1995).

The "practice of public accountancy" in Florida is defined as:

> (a) Offering to perform or performing for the public one or more types of services involving the expression of an opinion on financial statements. . . .
>
> (b) *Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any person holding himself or itself out as a certified public accountant or a firm of certified public accountants*, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out. . . .

Fla. Stat. § 473.302(5) (1995) (emphasis added). The term "holding out" in this definition means:

> [A]dvertising, *as part of a licensee's business activities*, that the licensee is a certified public accountant when providing, or offering to provide, services or products to the public which involve the use of accounting skills or one or more types of management advisory or consulting services.

Fla. Stat. § 473.302(5) (1995) (emphasis added).

Florida's regulatory framework for the "practice of public accountancy" is virtually identical to the framework used in almost all other states. Under this framework, only persons licensed by the state as a CPA (a "Licensee") may perform the services identified in Section 473.302(5)(a) (*i.e.*, the "attest functions"). The services in Section 473.302(5)(b) (*i.e.*, "accounting and tax services") may be performed by Licensees and non-Licensees alike. Performing accounting and tax services constitutes the "practice of public accountancy" under Florida law if, and only if, the individual or firm "holds out" to the public that the services are being provided by a CPA.

B. Factual Background And Procedural History

The factual background and procedural history are fairly presented in the Eleventh Circuit opinion below, are not contested by the Petitioners and are summarized below.

1. Factual Background

This case was brought by two parties whose interests are inextricably linked: (1) a large corporation named American Express Tax and Business Services, Inc. ("American Express") that is not and cannot be licensed by the state as a CPA firm; and (2) a Licensee named Miller who is employed by American Express and who performs accounting and tax services while seeking to hold himself out to the public as a CPA. Florida law prohibits a Licensee from practicing public accountancy in an unlicensed firm. *See* Fla. Stat. § 473.309 (1995). American Express cannot be licensed as a CPA firm, because American Express is not owned and controlled by licensed CPAs. *See* Fla. Stat. §§ 473.309, 473.3101. Therefore, Miller does not and cannot abide the regulatory framework governing the conduct of Licensees who "practice public accountancy."

Before he was employed by American Express, Miller operated a licensed CPA firm in Tampa, which firm provided public accounting services, including accounting and tax services, to the public. American Express purchased the accounting and tax parts of Miller's licensed CPA firm in November 1990. Until June 1994, American Express consistently took the position that it and its employees, both CPAs and non-CPAs, were not permitted to "hold out" as CPAs while providing accounting and tax services to clients. Thereafter, at the direction of American Express and for their mutual economic benefit, Miller began seeking to hold himself out to the public as a CPA while offering to perform and performing accounting and tax services for the public.

2. Procedural History

On October 19, 1994, American Express and Miller filed an action in the United States District Court for the Northern District of Florida under 28 U.S.C. §§ 1331 and 1343, 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983, against George Stuart, the Secretary of the Florida Department of Professional and Business Regulation and members of the Florida Board of Accountancy ("Petitioners" or "Board") in their capacity as such. Miller and American Express requested declaratory and injunctive relief to prohibit the Board from enforcing: (1) Sections 473.309 and 473.3101, Florida Statutes, which impose the ownership, corporate form and firm licensure conduct requirements on firms practicing certified public accountancy; and (2) Section 473.322, which limits the practice of public accountancy to Licensees. As grounds for the injunction, they claimed that Florida's regulatory framework violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

On November 23, 1994, the district court denied motions

for preliminary injunction and temporary injunction filed by the Plaintiffs. After discovery was completed, the Plaintiffs and the Board filed motions for summary judgment. On December 10, 1995, the district court entered an order dismissing American Express for lack of standing, granting Plaintiffs' Motion for Summary Judgment in part as to Miller, and denying the Board's Motion for Summary Judgment. The district court found that as applied to Miller and other similarly situated individuals, the enforcement of Florida Statutes §§ 473.302(5), 473.309, and 473.322, violated the First Amendment. The court permanently enjoined the state from enforcing these provisions to "the extent those laws prohibit a CPA employed by an unlicensed accounting firm and performing only nonattest business services . . . from truthfully informing clients or prospective clients that he or she is a CPA." Pet. App. B, *infra*, 61a.

American Express and the Board appealed to the Eleventh Circuit under 28 U.S.C § 1291. The Board challenged the district court's holding that a First Amendment standard applied to the Board's regulation of the practice of public accountancy and the application of First Amendment principles to the state's regulatory requirements. American Express argued that it had standing below because it sought to vindicate a right to inform the public that it employs CPAs, as well as to shield itself from discipline by the Board when its licensee employees "hold out" while performing accounting and tax services for the public. The Eleventh Circuit affirmed the district court's permanent injunction as to Miller, reversed the injunction as to "others similarly situated" and remanded American Express' First Amendment claim to the trial court.

REASONS FOR GRANTING THE WRIT

I.

THE MAJORITY OPINION OF THIS COURT IN *IBANEZ* LEFT UNANSWERED THE QUESTION OF WHETHER, UNDER FLORIDA'S DEFINITION OF THE PRACTICE OF PUBLIC ACCOUNTANCY, A CPA CAN BE DISCIPLINED FOR CONDUCT THAT VIOLATES STATUTORY OR REGULATORY STANDARDS APPLICABLE TO FLORIDA CPAS AND THIS CASE PRESENTS THIS CRUCIAL AND FUNDAMENTAL QUESTION.

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994), is one of the latest in a line of decisions addressing the application of the First Amendment to commercial speech.[2] *Ibanez* involved an attorney licensed by the State of Florida as a CPA who placed CPA next to her name in the yellow pages, on her business cards and on her law office stationary, and who was reprimanded by the Board for engaging in "false, deceptive and misleading" advertising. Recognizing that she had not been charged with or found guilty of violating any of the statutory or regulatory requirements governing her conduct of the "practice of public accountancy" and that she held a valid, active CPA license, the majority found that consumers could not be mislead by her truthful use of the CPA designation and reversed the state court action affirming the Board's reprimand.

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2. *See Edenfield v. Fane*, 507 U.S. 761 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980); and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

In so doing, the court acknowledged the state's assertion that Ibanez was practicing public accountancy in an unlicensed firm and implied that such a charge would be sustainable if properly pled and proven. *Ibanez*, 512 U.S. at 144 n.8. However, the majority did not reach the question of whether the combination of her "holding out" as a CPA and performing accounting services (*i.e.*, practicing public accountancy under state law) would justify applying First Amendment scrutiny to such a disciplinary action.[3] As the Eleventh Circuit specifically noted in its opinion, this case presents this question. 117 F.3d at 1381.

This question has now been answered differently by two courts of appeal and is critical to the regulation of CPAs in Florida and other states. Most states have adopted a regulatory framework under which the conduct requirements for the practice of public accountancy become operative when a person combines the act of "holding out" as a CPA and with the act of performing accounting and tax services. In addition, other important indicia of professionalism, such as adherence to technical standards, apply in Florida only when a CPA is "practicing public accountancy."

By answering the question reserved in *Ibanez* and holding that First Amendment scrutiny is compelled by virtue of the "holding out" portion of the definition of "public accountancy," the circuit court has materially expanded the parameters of this Court's commercial speech doctrine. Indeed, the opinion below uses this Court's commercial speech jurisprudence to invalidate the application of otherwise unexceptional economic and

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3. *See Ibanez*, 512 U.S. at 2094 ("It is open to the Board to proceed against [Ibanez] for practicing public accounting in violation of statutory or regulatory standards applicable to Florida Accountants.") (O'Conner, J., dissenting).

professional regulatory conduct requirements that would clearly have met a rational basis test under the Due Process Clause.[4] The Petition should be granted so the Court can continue to refine the boundaries between state regulation of professional conduct and free speech.

II.

THE ELEVENTH CIRCUIT OPINION CREATES A DIRECT CONFLICT BETWEEN THE CIRCUITS AND UNIFORMITY IS IMPORTANT.

This case presents an issue on which federal courts of appeal are in direct conflict. The Eleventh Circuit's decision that the State of Florida's regulatory framework for regulating CPAs implicates and violates the First Amendment is directly contrary to the result and the reasoning of the Ninth Circuit in *Johnson v. California State Board of Accountancy*, 72 F.3d 1427 (9th Cir. 1995).

Johnson involved a California licensed CPA who operated a solo accounting practice and was also licensed by the state to sell real estate and insurance. The licensee regularly identified himself as a CPA on his letterhead and business cards, performed accounting and tax services for the public and regularly accepted commissions for the sale of real estate and the referral of investment products to his accounting clients. Like Florida, California law limits the ability of those engaged in the practice of public accountancy to accept commissions.

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4. The reach of the First Amendment as a means to invalidate economic regulation has recently been before the Court. *See Glickman v. Wileman Bros. & Elliott, Inc.*, __ U.S. __, 117 S. Ct. 2130, 135 L. Ed. 2d 858 (1997).

After investigation, the California Board of Accountancy found that the licensee was holding himself out to the public as a CPA while offering accounting services, was therefore engaged in the "practice of public accountancy" under state law, had violated the accountancy law's prohibition against accepting commissions and, as a result, suspended his license to practice public accountancy. The licensee sought a preliminary injunction of the Board's action in the United States District Court for the Eastern District of California, which was denied. The Ninth Circuit affirmed.

In so doing, the Ninth Circuit recognized that California's regulatory framework for the practice of public accountancy did not ban dissemination of commercial information and declined to apply an enhanced scrutiny/First Amendment standard of review. The Ninth Circuit noted that California law "uses the equivalent of the phrase 'holding out' to identify and define conduct indicative of the practice of public accounting. . . ." *Johnson*, 72 F.3d at 1432-33. Thus, the court recognized that the "holding out" component of California's definition of public accountancy was the lynch pin of California's regulation of the conduct of public accountancy, not pure commercial speech to be evaluated under the First Amendment.

The Eleventh Circuit below recognized that its decision conflicts with the Ninth Circuit's decision in *Johnson*, but did not discuss the conflict. *See* 117 F.3d at 1382 n.7. Florida's regulatory framework for regulating the practice of public accountancy and its definition of the "practice of public accountancy" are almost identical to California's. However, contrary to the Ninth Circuit, the Eleventh Circuit found that Florida's regulatory framework does not regulate conduct and fails the commercial speech standards in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980), and its progeny.

That Florida and California have similar definitions of the practice of public accountancy is no accident. Both statutes were modeled after the Uniform Accountancy Act. *See* American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, *Uniform Accountancy Act*, Section 3(g), 1 C.C.H. *Acct. L. Rptr.* ¶ 1035. A substantial number of states have adopted the Uniform Act's definition of the practice of public accountancy. Having two circuits in such stark disagreement in such an important area is problematic because of the uncertainty it creates to those involved in the regulation of the practice of public accountancy in the United States. The petition should be granted to resolve this conflict.

III.

THE ELEVENTH CIRCUIT'S DECISION IS ERRONEOUS.

The petition should be granted because the Eleventh Circuit's decision is erroneous in four areas.

A. Because Florida's Regulatory Framework Regulates Professional Conduct, Not Speech, The Eleventh Circuit Erred By Applying A First Amendment Standard Of Review.

The State of Florida has decided that CPAs who practice public accountancy must do so in a licensed CPA firm. Furthermore, a corporation employing persons who practice public accountancy must be controlled by licensed CPAs to meet the firm licensure requirements in Florida law. This allows the state to exercise its police power over individual CPAs and the firms that employ them.

These requirements govern conduct and are rational. Licensure of the CPA firm ensures that the State may regulate

the policies and procedures of the accounting *firm* and not simply the individual actions of the CPA. Because most CPA services today are provided through firms, this allows the state to ensure that the policies and procedures of a firm practicing public accountancy do not violate Florida law or harm the public. The state is concerned not only with the individual CPA, who could easily be replaced, but also with the internal controls and standards that the firm itself has implemented to ensure that the firm as well as its CPA employees remain in compliance with applicable professional standards. By requiring that a CPA firm be controlled by CPA shareholders, the state ensures that the policies of the firm will be controlled by those who have the knowledge, understanding, and appreciation of the professional standards applicable to public accountancy. CPA control also increases the likelihood that the firm will establish an organizational environment, mission, and value system that places a premium on responsibility to the public, as reflected in the public accounting profession's code of professional standards.

Nevertheless, the Eleventh Circuit applied a First Amendment standard of review to Florida's regulatory framework, and affirmed an injunction that prevents the Board from taking disciplinary action against Miller for practicing public accountancy in an unlicensed firm. In so doing, the Eleventh Circuit failed to recognize that Florida, like California, "uses the equivalent of the phrase 'holding out' to identify and define conduct indicative of the practice of public accounting." *See Johnson*, 72 F.3d at 1432-33. The petition should be granted so this error can be corrected.

B. Because Florida Created The Title And Trademark Term "CPA", Florida Can Condition Its Use On Compliance With Statutes And Rules Governing Nonexpressive Conduct In The Practice Of Public Accountancy.

The state's grant of the title "CPA" to a Licensee is the state's stamp of licensure and approval given to those individuals and entities who are authorized to use the term. As this Court has recognized, this licensure designation is long-standing and nationally accepted. *Arthur Young v. United States*, 465 U.S. 805, 819 n.15 (1984). Licensure designation is akin to a trademark granted by the state to those who meet the state's standards and who accept the strictures upon which the state conditions the use of the title.

This Court has recognized the right of governments to create titles or marks and to arrogate to themselves the right to set standards for their use. In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. at 534-37, the Court held that there was a legitimate governmental interest directly advanced by Congress' determination that the U.S. Olympic Committee, which had been granted rights to the term "Olympic" by statute, should have sole control over the commercial use of the term because the public welfare was promoted by the success of the Olympic Games. The Court found that the unauthorized use of the trademark term "Olympic" would harm the interests of the trademark holder even if the unauthorized uses did not result in public confusion because the value of the term is inextricably intertwined with its "distinctiveness" and with the reliance that is thereby engendered.

The CPA licensure designation is similar to a trademark. Florida, along with all of the other states, has labored long and hard to imbue the CPA title with meaning. The lower courts' analyses erroneously treat the "CPA" designation as nothing

more than the shorthand form of a private professional attainment. The use of the "CPA" designation is, however, not just the announcement of a credential, it also announces that the individual is subject to Florida's regulatory framework and licensing standards. As noted by the Court in *Peel*, "much like a trademark, the strength of a certification is measured by the quality of the organization for which it stands." 496 U.S. at 102.

The Eleventh Circuit erred by relying on *Peel* and *Ibanez* to hold that the state could not restrict the use of state granted professional designations. As noted above, the majority in *Ibanez* did not reach that question. *Peel* dealt with state regulation of one party's use of a third party's designation, not the grantor's right to regulate the use of the title and designation it created and regulates. The Eleventh Circuit erred by failing to acknowledge Florida's right, as owner and regulator of the CPA designation, to determine the terms and conditions under which the designation CPA may be used.

In this regard, Florida's regulatory efforts at enhancing the public value of its "title" both directly advance and reasonably fit the state's interests. Any use of the CPA title that is inconsistent with the terms of licensure between the state and its licensees undermines public confidence in the title, results in a dilution of the public's perception of the state's regulatory authority and "tarnishes" the high public esteem in which the CPA title is held. The Eleventh Circuit erred by misapprehending the nature of the CPA designation and the state's interest in maintaining its regulatory authority over the practice of public accountancy.

C. If Florida's Regulatory Framework Implicates Expression, The Eleventh Circuit Erred By Giving First Amendment Protection To A Combination Of Conduct And Speech That Is Inherently False And Misleading.

Florida's regulatory framework is designed, among other things, to prevent false and deceptive statements and conduct. There is no First Amendment protection for false or deceptive messages. *Edenfield v. Fane*, 507 U.S. 761, 769 (1993); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

It is false and deceptive for a Licensee to perform professional services within the definition of the practice of public accountancy, advertise the fact of licensure, but not be in a position to comply with the profession's regulatory requirements for providing the services. If the Eleventh Circuit's decision stands, the public will not be able to distinguish a licensed CPA who is practicing public accountancy and fully complying with Chapter 473 from a CPA who is not. Likewise, the public will not be able to tell if it is receiving regulated public accounting services or unregulated accounting services.

American Express and Miller seek to trade upon the fact that Miller is a licensed CPA when providing accounting services to the public; therefore, they should be required to comply with Florida's regulatory requirements governing the use of the CPA license and the provision of public accounting services. The fact that the circuit court's opinion allows Miller to advertise his licensure as a CPA while he refuses to meet Florida's requirements relating to firm licensure and control, for which he would be sanctioned for non-compliance, makes his use of the title "CPA" false and deceptive. "[T]here is no arbitrary deprivation of [the right to continue to pursue a lawful occupation] where its exercise is not permitted because of a

failure to comply with conditions imposed by the state for the protection of society." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

D. If Florida's Regulatory Framework Regulates Commercial Speech That Is Not Inherently False And Misleading, Florida's Statutory Scheme Meets The *Central Hudson* Test.

The Eleventh Circuit erred by finding that Florida's regulatory framework does not meet the First Amendment standards. Under *Central Hudson* and its progeny, a state must show that: (a) the speech concerns unlawful activity or is misleading; (b) it has a substantial interest in proscribing speech; (c) the regulation advances the asserted state interest in a direct and material way; and (d) the extent of the restriction is in reasonable proportion to the interest served. 117 F.3d at 1382 (citations and quotations omitted). The Eleventh Circuit assumed, but did not find, that the second and third prongs of *Central Hudson* were satisfied, and focused on the first and fourth. Here is where the mistakes were made.

Contrary to the holding of the Eleventh Circuit, the Board did not rely solely on "conjecture and speculation" to support its claim that the speech here concerns unlawful activity or is misleading. The Board clearly showed that the public would be mislead by a CPA who "holds out" as a CPA without being subject to regulation as a CPA. It offered a public opinion poll showing that the public believes CPAs will perform accounting services competently, that the public is aware of and relies upon state regulation of the public accounting profession, and that the CPA profession generally has attained a high level of public confidence and reliance. Even if this evidence is not as strong as the Eleventh Circuit would have liked, as this Court recently noted, the state does not have to present empirical data buttressed by:

> a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584-585 (1991) (Souter, J., concurring), or even, in a case applying strict scrutiny, to justify restriction based solely upon history, consensus, and "simple common sense," *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Nothing in *Edenfield, supra*, a case in which the State offered no evidence or anecdotes in support of its restriction, requires more.

Florida Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995).

Moreover, the extent of the state's restrictions is reasonable in proportion to the interests served. Florida's regulatory framework does not contain a ban on advertisements, nor does it contain time, place or manner restrictions on the use of the term CPA. All Licensees who want to "hold out" as a CPA may do so. Florida merely requires those who seek to provide accounting services while holding themselves out as CPAs to comply with its regulations regarding the manner in which such services are provided. Those who do not wish to be subject to those regulations can refrain from holding out as a CPA. This allows licensees who do not wish to offer accounting and tax services in a licensed firm to do so without surrendering his or her license or being subject to discipline by the Board.

Importantly, while the Eleventh Circuit found that the state's regulatory framework is not narrowly tailored, the court failed

to identify any alternative that would serve to enforce the state's interests. The court's failure to do so is an apparent approval of the district court's finding that some form of disclaimer would be appropriate. While a disclaimer might be superficially alluring, a disclaimer would be unworkable and undesirable for the State of Florida. A disclosure that listed those provisions of Florida accountancy regulations with which Miller or his employer do not comply would not only be so lengthy as to be confusing, but in order to be accurate would be subject to continual modification, amendment, and lengthy explanation of its effect. The petition should be granted to correct these errors.

CONCLUSION

For the reasons set forth herein, the Board respectfully urges the Court to grant the petition.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 30, 1997

Stephen M. MILLER, Plaintiff-Appellee,

American Express Tax and Business Services, Incorporated, Plaintiff-Appellee-Cross-Appellant,

v.

George STUART, Secretary, as Head of the Florida Dept. of Business and Professional Regulation; John P. Baumann, Jr.; Charles H. Calhoun; Shaun M. Davis; Malcolm R. Duggan; Mirtha V. Martin; Francisco J. Paredes; Andrea A. Spottswood; David MacNamara; Zoya W. Phillips, Defendants-Appellants-Cross-Appellees.

No. 96-2068.

United States Court of Appeals,
Eleventh Circuit.

July 30, 1997.

* * *

Appeals from the United States District Court for the Northern District of Florida.

Before DUBINA and BLACK, Circuit Judges, and O'KELLEY*, Senior District Judge.

BLACK, Circuit Judge:

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* Honorable William C. O'Kelley, Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

Appendix A

Stephen M. Miller, a Certified Public Accountant (CPA) employed by American Express Tax and Business Services, Inc. (American Express), presents a First Amendment challenge to the State of Florida's regulation of public accountancy. The State's regulatory scheme prevents Miller from disclosing his CPA license to the public while performing accounting and tax services because he is employed by American Express, a firm not owned by CPAs. On cross-motions for summary judgment, the district court granted summary judgment in favor of Miller and dismissed American Express. We affirm the grant of summary judgment in favor of Miller, but reverse the district court's dismissal of American Express.

I. BACKGROUND

A. *Procedural History*

On October 19, 1994, Miller and American Express filed an action against George Stuart, the Secretary of the Florida Department of Business and Professional Regulation, and members of the Florida Board of Accountancy (collectively "the State of Florida" or "the Board"). They sought a declaration that the State of Florida's statutory scheme violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. On November 23, 1994, the district court denied motions filed by Miller and American Express for a temporary restraining order and a preliminary injunction. After discovery was completed, the parties filed cross motions for summary judgment. On December 11, 1995, the district court entered an order granting Miller's motion for summary judgment with respect to his First Amendment claim, denying the State's motion for summary judgment, and dismissing American Express. The State of Florida appeals the grant of summary

judgment in favor of Miller, and American Express cross appeals its dismissal.

B. *Factual Background*

Appellee Miller holds an active CPA license in the State of Florida and is the Managing Director of American Express in Tampa, Florida. American Express performs tax, bookkeeping, and accounting services for the public through its regional offices in 26 states. As American Express is a wholly-owned subsidiary of the publicly traded American Express Company, it is neither a professional service corporation nor owned entirely by CPAs (hereinafter "non-CPA firm"). Therefore, neither American Express nor its employees are eligible to practice public accountancy, i.e., provide public accounting services. *See* Fla. Stat. ch. 473.309 (1993) (confining public accountancy to CPA-owned partnerships, professional service corporations, and limited liability companies).[1] American Express, nevertheless,

---

1. In relevant part, chapter 473.309, provides:

> (2) A corporation shall not engage in the practice of public accounting in this state unless:
>
> (a) It is a professional service corporation duly organized in this or any other state;
>
> (b) Each shareholder of the corporation is licensed as a certified public accountant in some state and is principally engaged in the business of the corporation;
>
> (c) The principal officer of the corporation and any officer or director having authority over the

(Cont'd)

lawfully employs CPAs to perform accounting and tax services. These services fall within the types of services enumerated in the definition of public accountancy in Fla. Stat. ch. 473.302(5)(b) (Supp.1994) (hereinafter "accounting and tax services").[2] American Express' provision of these services,

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(Cont'd)

> practice of public accounting by the corporation is a certified public accountant in some state;
>
> (d) At least one shareholder of the corporation, and each shareholder, director, and officer domiciled in this state having authority over the practice of public accounting by the corporation, is a certified public accountant and holds an active license in this state;
>
> (e) It is in compliance with rules adopted by the board pertaining to minimum capitalization and adequate public liability insurance; and
>
> (f) It is currently licensed as required by s. 473.3101.

Fla. Stat. ch. 473.309. The Board enforces this regulation through its firm licensure requirement. *See* Fla. Stat. ch. 473.3101 (1993).

2. In relevant part, chapter 473.302 provides:

> (5) "Practice of," "practicing public accountancy," or "public accounting" means:
>
> . . .
>
> (b) Offering to perform or performing for the public one or more types of services involving the

(Cont'd)

however, does not constitute public accountancy because neither American Express nor its CPA employees disclose to the public that these services are performed by CPAs. *See id.* Accordingly, American Express' CPA employees need not meet the regulations on public accountancy,[3] and they provide the same unregulated accounting and tax services that non-CPAs lawfully provide.[4] *See id.; see also* Fla. Stat. ch. 473.322(1)(c) (Supp.1994).

(Cont'd)

> use of accounting skills, or one or more types of management advisory or consulting services, by any person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

Fla. Stat. ch. 473.302.

3. The regulations on public accountancy require a CPA to: (1) practice in the form of a proprietorship, a partnership, a professional service corporation, or a limited liability company owned entirely by CPAs, Fla. Stat. ch. 473.309; (2) not pay or accept commissions, Fla. Stat. ch. 473.3205 (1993); (3) not accept contingent fees, Fla. Stat. ch. 473.319 (1993); and (4) meet Board promulgated independence and competence standards, Fla. Stat. ch. 473.315 (1993).

4. American Express' CPA employees' services are, nevertheless, indirectly regulated to the extent that CPAs remain subject to disciplinary action by the Board for: (1) being convicted of a crime which directly relates to their ability to practice public accountancy; (2) knowingly filing false reports, failing to file reports as required by state or federal law, or obstructing their filing; (3) advertising in a manner that is fraudulent, false, deceptive, or misleading; (4) performing any fraudulent act; or (5) failing to maintain good moral character. Fla. Stat. ch. 473.323 (Supp.1994).

Appendix A

C. *The First Amendment Claim*

1. *Appellee Miller*

In his complaint, Miller sought to vindicate an asserted First Amendment right to disclose his CPA designation to current and prospective clients, including the right to place his CPA designation on business cards, letterheads, and written advertisements. Such advertisement of the fact of licensure would constitute "holding out" as a CPA within the meaning of Fla. Stat. ch. 473.302(6).[5] In turn, Miller's holding out as a CPA while performing accounting and tax services for the public would constitute public accountancy. *See* Fla. Stat. ch. 473.302(5)(b). The Board would then have the ability to revoke his license for unlawfully practicing public accountancy at American Express, a non-CPA firm. *See* Fla. Stat. chs. 473.323(1)(a), 473.323(3)(b). Miller, therefore, sought to enjoin the State of Florida from enforcing its statutory scheme, asserting that it infringed upon his First Amendment right by preventing him from holding himself out as a CPA. Miller sought a declaratory judgment that the State of Florida may not prevent him from holding himself out as a CPA while performing

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5. In relevant part, chapter 473.302 provides:

> (6) "Holding out" means advertising, as a part of a licensee's business activities, that the licensee is a certified public accountant when providing, or offering to provide, services or products to the public which involve the use of accounting skills or one or more types of management advisory or consulting services.

Fla. Stat. ch. 473.302.

accounting and tax services of the kind identified in Fla. Stat. ch. 473.302(5)(b), which he currently provides at American Express. Miller did not seek to have Fla. Stat. ch. 473.309, the statute that confines public accountancy to CPA-owned professional service corporations, invalidated. That is to say, Miller did not seek a right to provide public accountancy services that meet all the regulations on public accountancy, *see supra* note 3, except for those stated in Fla. Stat. ch. 473.309.

2. *Cross-Appellant American Express*

In a similar manner, American Express wanted to inform its clients that it employed CPAs to perform accounting and tax services. As such disclosure would constitute the unlawful practice of public accountancy by a non-CPA firm, *see* Fla. Stat. ch. 473.302(5)(b), American Express and its officers would be subject to prosecution, *see* Fla. Stat. ch. 473.322. Consequently, American Express also sought a declaratory judgment that under the First Amendment, the State of Florida may not proceed against it for the unlawful practice of public accountancy.[6]

II. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, applying the same legal standards used by the district court. *Parks v. City of Warner Robins*, 43 F.3d 609, 612-13 (11th Cir.1995). Where, as here, the facts related to the issue of standing are not in dispute, this Court reviews a district court's ruling that a party lacks standing de novo. *See Wilderness Soc'y v. Alcock*, 83 F.3d 386, 389 (11th Cir. 1996).

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6. As the district court did not address the equal protection claims of Miller and American Express, those claims are not before us.

Appendix A

III. DISCUSSION

A. *Appellee Miller*

1. *District Court Holding and Issues on Appeal*

The district court found that this case implicated the First Amendment and that Appellee Miller's holding out constituted commercial speech. In applying the four-part standard of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the district court further held that Florida's statutory scheme violates the First Amendment to the extent that it prevents Miller from holding himself out as a CPA at American Express. On appeal, the State of Florida maintains that this case does not implicate the First Amendment. Alternatively, the State of Florida contends that Miller's holding out is not protected commercial speech because it is misleading. The State of Florida further asserts that even if the speech in question is not misleading, the statutory scheme withstands constitutional scrutiny because the restrictions on speech are narrowly tailored and further substantial state interests.

2. *Whether this Case Implicates the First Amendment*

The Supreme Court has already found that an actively licensed CPA's use of the CPA designation constitutes commercial speech. *See Ibanez v. Florida Dep't of Bus. & Prof'l Regulation,* 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994) ("The Board correctly acknowledged that Ibanez' use of the CPA and CFP designations was 'commercial speech.' "); *see also Edenfield v. Fane,* 507 U.S. 761, 765, 113 S.Ct. 1792, 1797, 123 L.Ed.2d 543 (1993) (inperson solicitation

by a CPA is commercial speech); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 99, 110 S.Ct. 2281, 2287, 110 L.Ed.2d 83 (1990) (an attorney's holding out as a Certified Civil Trial Specialist, a credential granted by the National Board of Trial Advocacy, is commercial speech).

The State of Florida nevertheless insists that Miller's holding out is not speech, but conduct, because holding out *in conjunction* with offering to perform or performing accounting and tax services for the public is considered the practice of public accountancy. *See* Fla. Stat. ch. 473.302(5)(b). The *Ibanez* decision did not resolve this precise issue. Sylvia Ibanez, a lawyer-CPA, had used her CPA designation in commercial advertising related to her legal practice, but had not licensed her professional service corporation with the Florida Board of Accountancy because she claimed that she was not practicing public accountancy. *Ibanez*, 512 U.S. at 138-40, 114 S.Ct. at 2086-88. The Board brought a disciplinary proceeding, asserting *inter alia* that Ibanez' holding out in conjunction with her performance of services involving the use of accounting skills — preparation of tax opinions, representation before the IRS, evaluation of tax consequences of transactions, and financial counseling and planning — meant that she was practicing public accountancy, *see* Fla. Stat. ch. 473.302(5)(b), in an unlicensed firm. *See* Brief for the Florida Dep't of Bus. & Prof'l Regulation at 14-19, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994). The Board dropped this charge prior to the close of the administrative hearing, however. *Ibanez*, 512 U.S. at 140, 114 S.Ct. at 2087. Before the Supreme Court, the Board asserted that Ibanez' practice of public accountancy in an unlicensed firm was misleading. *See* Brief for the Florida Dep't of Bus. & Prof'l Regulation at 19 n.7. In rejecting the Board's arguments, the Court held:

> To survive constitutional review, the Board must build its case on specific evidence of noncompliance. Ibanez has neither been charged with, nor found guilty of, any professional activity or practice out of compliance with the governing statutory or regulatory standards. . . . Notably, the Board itself withdrew the only charge against Ibanez of this kind, viz., the allegation that she practiced public accounting in an unlicensed firm.

Ibanez, 512 U.S. at 144 & n. 8, 114 S.Ct. at 2089 & n. 8 (citations omitted). The Supreme Court, therefore, did not address whether the First Amendment would have been implicated had the Board charged Ibanez with practicing public accountancy in an unlicensed firm. This case squarely presents the very question the Supreme Court reserved — whether the First Amendment is implicated when the Board threatens prosecution of a CPA for holding out while performing accounting and tax services in an unlicensable non-CPA firm.

We reject the proposition that the State of Florida's statutory scheme is insulated from First Amendment review because it incorporates commercial speech into a class of regulated activity it refers to as public accountancy. "[A] court may not escape the task of assessing the First Amendment interest at stake" based on the label the state has placed upon the speech in question. *See Bigelow v. Virginia*, 421 U.S. 809, 826, 95 S.Ct. 2222, 2235, 44 L.Ed.2d 600 (1975). Whether Miller holds out in conjunction with performing accounting and tax services or performing other services, the fact remains that his holding out conveys significant information about his compliance with the education,

competence, and character requirements for a CPA license. *See Peel,* 496 U.S. at 101, 110 S.Ct. at 2288. Holding out to prospective and current clients in both situations allows Miller to advertise his qualifications, "educate the market and stimulate demand for his product or service." *Edenfield,* 507 U.S. at 766, 113 S.Ct. at 1797. Nor are we persuaded that holding out loses its protections under the First Amendment because it is a "subordinate component" of Miller's business transaction of performing accounting and tax services. *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 457, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978). Guided by this Supreme Court precedent, we conclude that a CPA's holding out while offering to perform or performing accounting and tax services for the public constitutes commercial speech and therefore warrants protection under the First Amendment.[7]

3. *The Central Hudson Standard*

As holding out in offering to perform or performing accounting and tax services constitutes commercial speech, the State of Florida must justify its restrictions under the *Central Hudson* standard. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Under *Central Hudson* and its progeny, the state must show that:

(a) the speech concerns unlawful activity or is misleading. *Edenfield,* 607 U.S. at 768, 113 S.Ct. at 1799. The

7. *But see Johnson v. California State Bd. of Accountancy,* 72 F.3d 1427, 1432-33 (9th Cir.1995) (statutory scheme that prohibited a CPA from accepting commissions in the performance of accounting and tax services only if he held out did not implicate the First Amendment even though it prevented the CPA from holding out in his accountancy practice).

government may completely ban false and inherently misleading commercial speech. *Id.;*

(b) it has a substantial interest in proscribing speech. *Edenfield,* 507 U.S. at 769, 113 S.Ct. at 1799. "[T]he *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Id.* at 768, 113 S.Ct. at 1798;

(c) the regulation advances the asserted state interest in a direct and material way. *Edenfield,* 507 U.S. at 770, 113 S.Ct. at 1800. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* (quoting *Central Hudson,* 447 U.S. at 564, 100 S.Ct. at 2350); and

(d) the extent of the restriction is in reasonable proportion to the interest served. *Board of Trustees of the State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989).

In shouldering its burden, a state may not rely on "speculation or conjecture," but must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield,* 507 U.S. at 770-71, 113 S.Ct. at 1800. This requirement is critical, since otherwise "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995) (quoting *Edenfield,* 507 U.S. at 771, 113 S.Ct. at 1800).

a. *Whether the Speech Concerns Unlawful Activity or is Misleading*

The State of Florida concedes that Miller's holding out as a CPA conveys truthful information about his compliance with the predicate requirements for obtaining a CPA license. Nonetheless it asserts that it is misleading because he is impressing the consumer that he is providing regulated public accounting services associated with CPAs when in fact he is providing services that any non-CPA can provide. The district court found that the State of Florida failed to produce any empirical evidence showing consumers will be misled in the manner the State suggests.

The district court's finding is supported by the record. The State of Florida relied solely on "speculation and conjecture" to support its assertion that Miller's holding out while performing accounting and tax services would mislead the public into believing that he is providing regulated public accounting services. *See Edenfield,* 507 U.S. at 770, 113 S.Ct. at 1800. The State of Florida has failed to carry its burden under the first part of the *Central Hudson* inquiry.

b. *Whether the State has a Substantial Interest in Proscribing Speech*

The State of Florida asserted the following interests at the district court: "first, protecting consumers from unqualified accountants through maintenance of a professional and regulatory scheme over individual accountants and accounting firms, and the accounting services they provide; and second, ensuring the accuracy of commercial information disseminated to consumers." The district court credited the State's interests

as substantial. We assume, without deciding, that the State's interests are substantial.

c. *Whether the Regulation Advances the State Interest in a Direct and Material Way*

The district court assumed, without deciding, that the statutory scheme advanced the State's asserted interests in a direct and material way. We also assume, but do not decide, that the evidence presented by the State of Florida sufficed to carry its burden of proving that its interests are directly and materially advanced.

d. *Whether the Extent of the Restriction is in Reasonable Proportion to the Interest Served*

The district court found that the State of Florida had not carried its burden of demonstrating that its statutory scheme was narrowly tailored because "a disclaimer or some other form of additional disclosure [would constitute] a narrower limitation that would allow Plaintiff Miller to hold himself out as a CPA in a non-misleading manner." The State of Florida nevertheless insists that there is a reasonable fit between the statutory scheme and its substantial interests. According to the State of Florida,

> Miller would be in a worse position if Florida did not utilize a "holding out" trigger. If Florida found that Miller and other CPAs were engaged in the practice of public accounting merely because they have a CPA license and are doing accounting and tax work, the result would be that Miller and other CPAs could not work for firms like

> [American Express] as licensed CPAs because they would be providing [public accounting services] in an [unlicensable non-CPA] firm. Thus, Florida's definition of public accounting actually has the effect of narrowing the scope of regulation.

While the State of Florida describes its statutory scheme as narrow, its argument relies on faulty "greater-includes-the-lesser" reasoning. That is to say, the State is asserting that if it can wholly prohibit Miller from performing accounting and tax services for the public at a non-CPA firm, surely it can allow him to perform these services subject to the limitation that he may not hold out. The government, however, may not justify its regulation of speech as a "reasonable choice" by comparing it to a more intrusive non-speech regulatory alternative. *44 Liquormart, Inc. v. Rhode Island*, __ U.S. __, __, 116 S.Ct. 1495, 1510-12, 134 L.Ed.2d 711 (1996) (plurality opinion) (striking down a ban on alcohol price advertisement that was intended to promote temperance by causing higher alcohol prices because the state could promote its temperance goal through "obvious . . . alternative forms of regulation that would not involve any restriction on speech"); *Coors Brewing Co.*, 514 U.S. at 489, 115 S.Ct. at 1593 (holding that a federal law prohibiting beer labels from displaying alcohol content violated the First Amendment because available alternatives — including directly limiting the alcohol content of beers — could have achieved the government's aim without suppressing speech). The danger in accepting such an argument is that it would allow the state to use restrictions on commercial speech to shield its policies "from the public scrutiny that more direct, nonspeech regulation would draw." *44 Liquormart*, __ U.S. at __, 116 S.Ct. at 1511 (plurality opinion). Therefore, the State's argument that it chose the

suppression of commercial speech over a more intrusive nonspeech regulation of public accountancy is unavailing.

The State of Florida also asserts that, "[q]uite simply, Florida, along with other states, created the title, imbued it with meaning, and may decide the terms and conditions under which the title can be used." The fact that the State has chosen to license individuals to use the CPA title does not change the *Central Hudson* analysis. "Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart*, __ U.S. at __, 116 S.Ct. at 1513 (plurality opinion). Accordingly, the State of Florida may not impose as a condition of licensure a requirement that is violative of the First Amendment.

Consequently, we hold that the State of Florida has failed to justify the speech restriction inherent in its statutory scheme, which completely prevents Miller from holding himself out as a CPA, because it has not shown the scheme to be narrowly tailored. As the State of Florida has failed to justify its statutory scheme under the *Central Hudson* standard, we hold that the statutory scheme is unconstitutional to the extent that it prevents Miller from holding himself out as a CPA while offering to perform or performing accounting and tax services of the kind identified in Fla. Stat. ch. 473.302(5)(b), which he currently provides at American Express, a non-CPA firm.

4. *District Court's Grant of Relief to Similarly Situated CPAs*

In structuring the relief requested by Appellee Miller on his First Amendment claim, the district court stated:

> 6. The Court holds that, as applied to Plaintiff Miller *and other similarly situated individuals*, the enforcement of Florida Statutes §§ 473.302(5), 473.309, and 473.322, violate[s] the First Amendment to the Constitution of the United States, to the extent that those laws prohibit *a CPA employed by an unlicensed accounting firm*and performing only nonattest business services of the kind identified in Florida Statute § 473.302(5)(b) from truthfully informing clients or prospective clients that he or she is a CPA.
>
> 7. Defendants are permanently enjoined from enforcing Florida Statutes §§ 473.302(5), 473.309, and 473.322, to the extent that those laws prohibit *a CPA employed by an unlicensed accounting firm* and performing only nonattest business services of the kind identified in Florida Statute § 473.302(5)(b) from truthfully informing clients or prospective clients that he or she is a CPA. This injunction is to remain in full force and effect until further order of the Court.

(emphasis added). We note, however, that Cross-Appellant American Express' claim on behalf of its CPA employees was not before the district court and Appellee Miller did not initiate a class action suit seeking to vindicate the constitutional rights of similarly situated CPAs. Consequently, in granting relief to "similarly situated individuals," the district court improperly

granted relief to persons who were not parties to the litigation. We therefore vacate the grant of summary judgment in favor of individuals other than Appellee Miller.

B. *Cross-Appellant American Express*

1. *District Court Holding and Issues on Appeal*

The district court concluded that American Express was neither challenging the State of Florida's prohibition on an unlicensed firm from holding itself out as an accounting firm nor seeking to hold itself out as an accounting firm. Consequently, the district court considered it unlikely that American Express would "be prosecuted for a constitutionally protected activity." Absent the threat of prosecution, the district court determined that American Express had not suffered injury-in-fact, one of the constitutional prerequisites for standing. *See United States v. Hays*, 515 U.S. 737, __, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995). The district court therefore dismissed American Express for lack of standing. On appeal, American Express asserts that it has standing because it sought to vindicate a right to inform the public that it employs CPAs, as well as to shield itself from prosecution when its CPA employees hold out while performing accounting and tax services for the public.

2. *Whether American Express has Standing*

To demonstrate constitutional standing, a plaintiff must show injury-in-fact, a causal link between the injury and the conduct complained of, and that a favorable decision would redress his injury. *Hays*, 515 U.S. at __, 115 S.Ct. at 2435. "A plaintiff stating that he intends to engage in a specific course of conduct arguably affected with a constitutional interest . . . does

not have to expose himself to enforcement to be able to challenge the law." *Jacobs v. The Florida Bar,* 50 F.3d 901, 904 (11th Cir.1995) (internal quotation marks omitted). Instead, a plaintiff can have standing where it is likely he will be prosecuted for engaging in a constitutionally protected activity. *Id.*

We find that American Express satisfies these requirements. American Express is suing to vindicate its asserted First Amendment right to commercially advertise the fact that the accounting and tax services it offers to the public are performed by its CPA employees. Were American Express to do so, it could be prosecuted for practicing public accountancy without a firm license. *See* Fla. Stat. ch. 473.302(5)(b) (a firm is considered to be engaged in public accountancy if it holds out its CPA employees in the provision of accounting and tax services to the public). Moreover, were its CPA employees to hold out while performing accounting and tax services for the public, American Express as a separate corporate entity would also be engaged in the unlawful practice of public accountancy. *See Garcia v. Texas State Bd. of Medical Examiners,* 384 F.Supp. 434, 436 (W.D.Tex.1974) (noting that when a corporation employs a licensed physician to treat patients and itself receives the fee, the corporation is engaged in the practice of medicine), *aff'd,* 421 U.S. 995, 95 S.Ct. 2391, 44 L.Ed.2d 663 (1975). Consequently, American Express can be prosecuted either for exercise of its commercial speech rights or for its CPA employees' exercise of their commercial speech rights. American Express therefore has standing because its injury is real and the relief requested in this action would directly redress its injury.

IV. CONCLUSION

For the reasons stated in this opinion, we affirm the grant of summary judgment in favor of Appellee Miller, vacate the

grant of summary judgment in favor of individuals other than Appellee Miller, reverse the district court's dismissal of Cross-Appellant American Express, and remand the case to consider American Express' First Amendment claim.

AFFIRMED in part, VACATED in part, REVERSED in part, and REMANDED.

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION FILED DECEMBER 11, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCA 94-40526-MMP

AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC., and STEPHEN M. MILLER,

Plaintiffs,

v.

GEORGE STUART et al.,

Defendants.

ORDER AND FINAL JUDGMENT

This cause comes before the Court on the parties' cross motions for summary judgment (Docs. 118 & 119) and Defendants' motion to strike (Doc. 129). Responses have been filed to each of these motions. For the reasons outlined below, Defendants' motion to strike is DENIED, Plaintiffs' summary judgment motion is GRANTED IN PART, and Defendants' summary judgment motion is DENIED.

Appendix B

BACKGROUND:

A. Florida's Regulation of Public Accounting:

Florida first enacted a public accountancy licensure law in 1905, becoming the eighth state to do so. Dooner Report at 15 (Defs.' Ex. to Doc. 132). In 1931, Florida began licensing certified public accounting ("CPA") firms. 1931 Fla. Laws ch. 15637. These laws were later upheld as valid exercises of the state's police powers. *See Florida Accountants Ass'n v. Dandelake*, 93 So. 2d 323, 326 (Fla. 1957) (en banc); *Heller v. Abess*, 134 Fla. 610, 614-15, 184 So. 122, 124 (Fla. 1938); *see generally Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108, 112 S. Ct. 2374, 2388, 120 L. Ed. 2d 73 (1992) (states have broad power to establish standards for licensing practitioners and regulating practice of professions).

Florida presently has in effect a comprehensive set of regulations governing the practice of accounting. *See* Fla. ch. 473 (Supp. 1995); Fla. Admin. Code ch. 61H1 (1995). The purpose of these regulations are

> . . . to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners . . . in the interest of public welfare . . .

Fla. Stat. § 473.301. The Board of Accountancy ("Board") of the Department of Business and Professional Regulation has been charged with the adoption and enforcement of rules governing the licensure of CPAs. Fla. Stat. § 473.304. *See also*

Appendix B

Fla. Admin. Code ch. 61H1-19 (describing Board's rulemaking powers).

A person may obtain an accounting license only after the Board certifies the person is of good moral character, and the person has complied with certain educational requirements, paid the appropriate licensing fees, and passed a Board administered examination. *See* Fla. Stat. §§ 473.305- .308. *See also* Fla. Admin. Code ch. 61H1-27 (educational and experience requirements); *id.* at ch. 61H1-28 (examinations); *id.* at ch. 61h1-29 (licensure by endorsement); *id.* at ch. 61H1-31 (fees). Licensees are required to periodically complete continuing education requirements in order to maintain an active accounting license. *See* Fla. Stat. § 473.312; Fla. Admin. Code ch. 61H1-33. Only those public accountants holding active licenses and in good standing with the Board are permitted to use the designation "C.P.A." *See* Fla. Stat. § 473.322(1)(b).

A corporate firm[1] may obtain an accounting license only if the following requirements are met: (1) it is a professional service corporation; (2) each shareholder is a licensed accountant and is "principally engaged in the business of the corporation"; (3) its principal officer and all officers with authority over the practice of public accounting are licensed accountants; (4) at least one of its shareholders and all its officers domiciled in Florida with authority over the practice of public accounting are licensed accountants holding active licenses in Florida; and

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1. " 'Firm' or 'Firms of certified public accountants' shall be deemed and construed to mean a . . . professional corporation . . . engaged in the practice of public accounting, *including individual partners, stockholders or members thereof*." Fla. Admin. Code r. 61H1-20.006 (1993) (emphasis added).

(5) it is in compliance with the Board's rules pertaining to capitalization and insurance. Fla. Stat. § 473.309. *See also* Fla. Stat. § 473.3101 (describing corporate firm licensure); Fla. Admin. Code r. 61H1-26.002 (1994) (capitalization and insurance requirements). Hence, firm licensure is restricted to those partnerships and firms owned entirely by CPAs — not unlike similar provisions restricting ownership of law firms[2].

Unlicensed persons or firms, and persons or firms holding inactive accounting licenses, are prohibited from practicing public accounting. Similarly, CPAs with active accounting licenses who work for unlicensed accounting firms are prohibited from practicing public accounting in their capacities with those unlicensed firms[3]. *See* Fla. Stat. §§ 473.308, 473.322(1)(a); Fla. Admin. Code. r. 61H1-20.006. "Practicing public accountancy" is defined as either

> (a) Offering to perform or performing for the public one or more types of services

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2. *Compare* Fla. Stat. § 473.309(2) (requiring 100% ownership and control of accounting firm by CPAs) *with* Florida Bar Rule 4-5.4 (lawyer or law firm shall not share fees with nonlawyers, form partnerships with nonlawyers involving practice of law, or practice law for corporation providing legal services in which nonlawyer owns an interest or controls professional judgment of lawyer) and Florida Bar Rule 4-8.6 (providing similar limitations on lawyers practicing law in the form of professional service corporations).

3. However, although active licensees are prohibited from holding themselves out as CPAs in their capacities with unlicensed firms, such licensees may still practice public accounting *outside of those firms* — including holding themselves out as CPAs. *See* Fla. Admin. Code r. 61H1-21.009 (1993).

involving the expression of an opinion on financial statements[4], the attestation as an expert in accountancy to the reliability or fairness of presentation of financial information[5], the utilization of any form of

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4. The Florida Administrative Code provides that

> "Financial statements" shall be deemed and construed to mean a presentation of financial data, including accompanying notes, derived from accounting records that purports to show actual or anticipated financial position and intended to communicate an entity's economic resources or obligations at a point in time, and the results of operations and cash flows for a period of time, in accordance with generally accepted accounting principles or a comprehensive basis of accounting other than generally accepted accounting principles. Financial presentations included in tax returns are not financial statements. The method of preparation (for example, manual or computer preparation) is not relevant to the definition of a financial statement.

Fla. Admin. Code r. 61H1-20.005 (1993).

5. The Florida Administrative Code provides that

> [t]he terms "attest as an expert in accountancy to the reliability or fairness of presentation" and "expression of opinion" shall be deemed and construed to mean any report, transmittal letter or other written communication issued as a result of an examination or review of financial statements or financial information which contains either an

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disclaimer of opinion which conveys an assurance of reliability as to matters not specifically disclaimed, the expression of an opinion on the reliability of an assertion by one party for the use of a third party, or the preparation of financial statements by a certified public accountant, a firm of certified public accountants, or a firm in which a certified public accountant has an ownership interest, including the performance of such services in the employ of another person; or

(b) offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, *by any person holding himself or itself out as a certified public accountant* or a firm of certified public

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expression of opinion or other assurance as to the fairness, accuracy, or reliability of such financial statements within the meaning of generally accepted auditing standards or standards for accounting and review services. A report issued in connection with a review of financial statements is an "expression of opinion." Statements, affidavits or signatures of preparers required in tax returns and reports issued in connection with a compilation of financial statements are not "expressions of opinion," but compilations do provide a level of assurance.

Fla. Admin. Code r. 61H1-20.002 (1995).

> accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

Fla. Stat. § 473.302(5) (emphasis added). "Holding out" means "advertising, as a part of a licensee's business activities[6], that the licensee is a certified public accountant when providing, or offering to provide, services or products to the public which involve the use of accounting skills or one or more types of management advisory or consulting services." Fla. Stat. § 473.302(6). Any person who unlawfully practices public accounting is guilty of a first degree misdemeanor, punishable as provided in § 775.082 or § 775.083, *see* Fla. Stat. § 473.322(2), and is subject to discipline by the Board, *see* Fla. Stat. § 473.323; Fla. Admin. Code r. 61H1-36.001 (1993).

On the other hand, unlicensed persons or firms, persons or firms holding inactive accounting licenses, as well as CPAs with active accounting licenses who work for unlicensed accounting firms, may legally provide ". . . other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon." Fla. Stat. § 473.322(1)(c). Stated another way, such individuals or firms may provide any accounting services that do not require the expression of an opinion on financial statements, attestation as an expert in accountancy, or utilization of a disclaimer of opinion providing assurances of reliability. *See* Fla. Stat. §§ 473.302(5)(a), 473.322(1)(c).

As a result of the foregoing regulatory framework, if a CPA working for a firm holds themselves out as a CPA in their

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6. *See* Fla. Admin. Code r. 61H1-24.001(2) (1995) .

capacity with that firm, then the firm must be licensed by the Board as an accounting firm — even if the CPA only provides those services described in § 473.322(c). *See* Fla. Stat. §§ 473.309, 473.3101; Dec. 18, 1984 official opinion letter from the Board, Pls.' Ex. 21 to Willis Dep. ("A CPA can be an employee of a non-certified accounting firm. However, he cannot hold himself out as a CPA and the firm cannot hold him out as a CPA.") (*under seal*); May 8, 1984 official opinion letter from the Board, Pls.' Ex. 18 (same) (*under seal*).

B. The Case At Bar:

Plaintiffs in this action are American Express Tax and Business Services, Inc. ("TBS"), a subsidiary of the American Express Company[7], and Stephen Miller, the Senior Managing Director of TBS in Tampa, Florida.

TBS employs a number of certified public accountants ("CPAs"), providing services including tax preparation, bookkeeping, and compilation of financial statements to business clients through its regional offices in twenty-six states. Since TBS is a publicly traded corporation that is not owned 100% by CPAs, it cannot be licensed as an accounting firm. As a result, TBS does not perform auditing or attesting work, in order to avoid the firm licensure requirements.

Plaintiff Miller is an accountant holding an active accounting license in the State of Florida, and is in good standing with the Board. Mr. Miller has a B.A. degree from Colby College, and a Master of Science degree in Professional

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7. TBS was substituted as a party plaintiff for IDS Financial Services, Incorporated, pursuant to the Court's order of March 10, 1995 (Doc. 69).

Accounting from the University of Hartford. Although he is not required to meet the Board's continuing education requirements because he is not presently practicing public accounting as defined by Florida law, Mr. Miller continues to voluntarily meet these education requirements. Consequently, Mr. Miller can lawfully use the designation "C.P.A." *See* Fla. Stat. § 473.322(1)(b).

Plaintiff Miller was previously a co-owner and named partner of a Tampa accounting firm, Miller & Leikman, CPAs. As a CPA in a licensed accounting firm, Mr. Miller prepared financial statements and tax returns, counseled clients, performed audits, and trained other CPAs. Mr. Miller provides many of these services in his capacity with TBS, except for those requiring attestation or public guarantees of reliability. However, the Florida regulatory framework prohibits Mr. Miller and other accountants holding active licenses who are employed by unlicensed accounting firms from "holding themselves out" as CPAs. In other words, in his capacity with TBS, Mr. Miller cannot advertise or otherwise inform consumers he is a CPA (*see* Compl.; Answer, Doc. 17; statement of undisputed facts and law contained in joint pretrial stipulation, Doc. 114; Plaintiffs' statement of facts, Doc. 127; Defendants' response to Plaintiffs' statement of facts, Doc. 128; and citations contained therein).

Plaintiffs therefore filed the instant action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201[8]. This Court properly has jurisdiction under 28 U.S.C.

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8. Plaintiffs previously litigated these issues on state law grounds in state court. *See IDS Fin. Serv., Inc. v. Department of Bus. & Prof. Reg.*, No. 94-1298 (Fla. 2d Cir. Ct.). The state court action was dismissed without prejudice in a consent final judgment dated August 23, 1994 (*see* Attach. 4 to Doc. 19 at ¶ 8).

§ 1331, since the request for equitable relief involves a federal question, and venue is proper under 28 U.S.C. § 1391.

According to Plaintiffs' complaint (Doc. 1), Florida's regulatory prohibition on "holding out" substantially enhances the competitive position of licensed CPA firms, while impairing the ability of licensed CPAs to work for unlicensed accounting firms. Plaintiffs also allege these statutory provisions "deny consumers the ability to obtain truthful, non-misleading and relevant information about entirely lawful commercial activity" (Compl. at ¶ 1). Finally, Plaintiffs contend that Florida's prohibition on CPAs at unlicensed firms to hold themselves out as CPAs amounts to an unconstitutional ban on truthful commercial speech.

Plaintiffs request this Court to declare that the enforcement of Florida Statutes §§ 473.302(5), 473.309, and 473.322, as applied to CPAs employed by TBS, and those similarly situated, violates the First and Fourteenth Amendments[9]. Plaintiffs seek to enjoin the named Defendants[10] from enforcement of these

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9. Plaintiffs also claimed in their memorandum in support of their motion for a preliminary injunction that the statutory provisions violate the Equal Protection Clause of the Fourteenth Amendment because they create two groups of CPAs:

> (i) those who are qualified to hold a CPA license, do hold a CPA license, and who *may* exercise their first amendment rights; and (ii) those who are qualified to hold a CPA license, do hold a license, and who *may not* exercise their first amendment rights

Doc. 4 at 29 (emphasis in original).

10. Plaintiffs originally sued the named Defendants in both their (Cont'd)

regulatory provisions "to the extent that those laws prohibit a CPA employed by a non-CPA firm and performing only 'business services'. . . from truthfully informing clients or prospective clients that he or she is a CPA" (Compl. at 15-16).

Plaintiffs filed a motion for a preliminary injunction (Doc. 3) contemporaneously with their complaint. The Court denied that motion (Doc. 37). Plaintiffs subsequently moved for a temporary restraining order (Doc. 23). The Court also denied that motion (Doc. 42).

This cause now comes before the Court on Defendants' motion to strike (Doc. 129) and the parties' cross-motions for summary judgment (Docs. 118 & 119). In addition, The Florida Institute of Certified Public Accountants and The American Institute of Certified Public Accountants have each moved for leave to file amicus curiae briefs (Docs. 134 & 135) in support of Defendants' summary judgment motion. These motions by the proposed amici are GRANTED.

DISCUSSION:

I. Standing Of TBS As A Party Plaintiff:

Although none of the parties or amici have raised the issue of TBS's standing as a party plaintiff, the Court is obliged to

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individual and official capacities (Compl.). However, the Court later dismissed Plaintiffs' individual capacity claims (*see* Doc. 116). Defendant George Stuart is Head of the Florida Department of Business and Professional Regulation, Division of Professions, Board of Accountancy. The other named Defendants, including John P. Baumann, Jr., Charles H. Calhoun, Shaun M. Davis, Malcolm R. Duggan, Mirtha V. Martin, Francisco J. Paredes, Andrea A. Spottswood, David MacNamara, and Zoya W. Phillips, are all members of the Florida Board of Accountancy.

examine this question *sua sponte*. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975); *In re Weaver*, 632 F.2d 461, 463 n.6 (5th Cir. 1980)[11]. Failure of TBS to have standing will deprive the Court of subject matter jurisdiction over TBS's claim.

There is some language in the complaint that seems to indicate TBS is suing in its own right[12]. However, Plaintiffs' request for relief demonstrates that TBS is not challenging restrictions on its ability to hold itself out as a tax and business firm employing CPAs (*see* Compl. at 15-16). Plaintiffs concede as much in their opposition brief to Defendants' summary judgment motion, stating that

> Plaintiff TBS similarly seeks only the right *to have its CPA employees advertise the truthful fact that they are CPAs*, while

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11. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

12. *See* Compl. at ¶ 1 ("The challenged provisions . . . unjustifiably enhance the competitive position of CPA firms . . ."); *id.* at ¶ 7 ("IDS seeks the right to disseminate and disclose the truthful fact that these tax and business services are lawfully available from CPAs employed by IDS."); *id.* at ¶ 29 ("a . . . corporation that limits itself to the tax and business services . . . is 'practicing public accounting' under Florida law *only if* the CPAs in its employ 'hold out' to the public that they are CPAs.") (emphasis in original); *id.* at ¶ 32 ("This regulatory scheme law [sic] places severe, unjustified restrictions on the ability of unlicensed . . . corporations firms [sic] to deliver entirely lawful desired services to clients and prospective clients . . . and on the ability of such firms . . . to provide truthful, non-misleading and commercially relevant information to consumers and to compete with licensed CPA firms.).

> continuing to provide the nonattest tax and business services TBS may now lawfully provide under Florida law. *Plaintiff TBS does not seek the right to hold itself out as a CPA firm.*

Doc. 144 at 6 (emphasis added). Thus, TBS is suing on behalf of its CPA employees for the ability to hold themselves out as CPAs — and not the right of TBS to hold its employees out as CPAs, or to otherwise hold itself out as a CPA firm[13].

To have constitutional standing, Plaintiffs must demonstrate they have suffered an "injury in fact," causation between the injury and the conduct complained of, and that the injury can be redressed by a favorable decision. *United States v. Hays*, 514 U.S. __, 115 S. Ct. 2431, 2435, 132 L. Ed. 2d 635 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)); *see also Jacobs v. The Florida Bar*, 50 F.3d 901, 903-04 (11th Cir. 1995) (discussing standing in the context of attorneys' challenge to restriction on attorney advertising). "A plaintiff stating that he 'intends to engage in a specific course of conduct arguably affected with a constitutional interest, . . . does not have to

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13. To the extent that the complaint contains other factual allegations seemingly giving rise to a claim by TBS on its own behalf (*see supra* note 12), those contradictory allegations render such a claim completely unworthy of belief. *Cf. Levine v. Prudential Bache Properties, Inc.*, 855 F. Supp. 924, 938 (N.D. Ill. 1994) (contradictory allegations in complaint could not withstand motion to dismiss); *Bonham v. Orden*, No. 91-2586, 1991 WL 229950, at *1 (D.D.C. 1991) ("The contradictory allegations in plaintiff's complaint render it patently frivolous."); *Indiana Ins. Co. v. Ehrlich*, 880 F. Supp. 513, 519 (W.D. Mich. 1994) (non-movant plaintiff could not contradict allegations of its own complaint to create genuine issue of fact and avoid summary judgment).

expose himself to enforcement to be able to challenge the law.' " *Id.* at 904 (quoting *ACLU v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993)). Instead, a plaintiff can have standing where it is likely he will be prosecuted for engaging in a constitutionally protected activity. *Jacobs*, 50 F.3d at 904 (collecting citations).

TBS does not challenge the prohibition on unlicensed accounting firms from holding themselves out as accounting firms. TBS has similarly asserted that it does not intend to hold itself out as an accounting firm. As a result, it is unlikely that TBS will be prosecuted for a constitutionally protected activity. Consequently, TBS has not suffered an injury in fact, and lacks constitutional standing as a plaintiff in this action.

In addition to Article III's standing requirements, the Supreme Court has imposed prudential limitations on standing to sue. One such prudential limitation is the requirement that plaintiffs must assert their own rights and may not rest upon the rights of others. *Knight v. Alabama*, 14 F.3d 1534, 1554 (11th Cir. 1994) (citing *Wirth*, 422 U.S. at 499, 95 S. Ct. at 2205). This limitation does not apply "where (1) the relationship between the plaintiff and the third party is such that the plaintiff is nearly as effective a proponent of the third party's right as the third party itself, and (2) there is some obstacle to the third party asserting the right." *Knight*, 14 F.3d at 1554.

Even assuming that TBS has constitutional standing, TBS clearly cannot get past the prudential limitation on its right to sue on behalf of its CPA employees. First, the relationship between TBS and its CPA employees is not such that TBS would be as effective an advocate as the CPA employees themselves[14].

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14. *Cf. Region 8 Forest Serv. Timber Purchasers Council v. Alcock*,

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Second, the participation in this litigation by Plaintiff Miller, one of the third party CPA employees on whose behalf TBS seeks to challenge the holding out limitation, demonstrates that there is no obstacle to the third party CPAs from asserting their constitutional rights for themselves. *See id.* at 1554-55 & n.6. Consequently, TBS also lacks prudential standing as a proper party plaintiff, and is DISMISSED from this cause.

II. Defendants' Motion To Strike (Doc. 129):

Defendants move to strike the deposition transcript of James L. Craig and exhibits thereto, and all of Plaintiffs' references to the transcript and exhibits (Doc. 129). Defendants contend that after discovery closed, Plaintiffs noticed Craig for a third party deposition, including production of certain documents containing reviewers' comments of an article submitted to The CPA Journal (a publication of the New York State Society of CPAs) by Defendants' expert, Dr. Lawrence Ponemon. Dr. Ponemon's article is very similar to the expert report he prepared in support of Defendants' case. Defendants object to the use of Craig's testimony and the reviewers' comments on the grounds that they were obtained outside the discovery period, contain inadmissible hearsay, and provide expert criticism of Ponemon's article despite the fact that the individual reviewers were never listed as expert witnesses in this action. Plaintiff Miller has filed a response and supporting exhibits in opposition to Defendants'

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993 F.2d 800, 810 (11th Cir. 1993) ("In cases allowing third-party standing, the relationship between the party asserting the right and the third party has been characterized by a strong identity of interests which is absent in an employer/employee relationship.") (collecting cases), *cert. denied*, 114 S. Ct. 683 (1994).

motion (Doc. 146). Defendants have replied to Plaintiff's opposition brief (Doc. 153).

The first issue is whether the materials in question were obtained outside the discovery period, which closed on June 30, 1995 (Doc. 76). Plaintiff Miller maintains that to the extent any discovery was conducted after the cut-off date, it was as a result of Defendants' own actions, Dr. Ponemon's lack of candor at his first deposition, and Dr. Ponemon's subsequent failure to produce the requested documents at his second deposition duces tecum prior to the close of discovery. The Court agrees.

Plaintiff Miller made a timely request for the production the contested materials through various requests for production and notices for depositions duces tecum[15]. Although Plaintiff did not notice the documents for third party production nor take the Craig deposition duces tecum until mid-July, 1995 (*see* Pl.'s Exs. A & D to Doc. 146), the delay resulted from Dr. Ponemon's failure to fully disclose to Plaintiff at his first deposition the

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15. In Plaintiff Miller's notice for Dr. Ponemon's June 23, 1995 deposition duces tecum, Miller specifically requested

> [a] copy of all articles . . . or other materials submitted for publication to any trade or professional journal, or any periodical of any kind, since 1993, all drafts . . . and all correspondence sent by the deponent to and all correspondence or other written material received by the deponent from any prospective publisher in connection with the submission of any such article . . . or other material . . .

Pl.'s Ex. E to Doc. 146 at ¶ 10.

materials submitted to The CPA Journal[16]. The Court has wide discretion in setting the limits of discovery and determining whether to grant extensions of time for discovery. *E.g.*, *Hancock v. Hobbs*, 967 F.2d 462, 468 (11th Cir. 1992); *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029, 1033 (5th Cir. Unit B Sept. 1981). Accordingly, to the extent that the deposition and documents in question were obtained after the close of discovery, Plaintiff Miller is granted leave to file such materials, which shall be deemed timely discovered.

The next question is whether the materials in question should be excluded as inadmissible hearsay. Plaintiff Miller correctly points out that the Craig deposition itself contains no substantive testimony, but merely authenticates business records kept in the ordinary course of business by The CPA Journal. Therefore, the Craig deposition is admissible in its entirety. Plaintiff Miller also maintains that all of the documents in question (the written communications between Dr. Ponemon and The CPA Journal regarding publication of an article by Dr. Ponemon) are either adoptive admissions by Dr. Ponemon or are properly authenticated business records, and therefore should not be excluded as hearsay.

Dr. Ponemon's letters and articles submitted to The CPA Journal are admissible. To the extent these documents reflect

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16. Defendants maintain in their reply brief that Dr. Ponemon did not inform counsel until the day of the June 23, 1995 deposition that he had submitted articles to The CPA Journal (Doc. 153 at 5 n.5). However, Dr. Ponemon did not acknowledge the existence of the articles in question to Plaintiff's counsel until his June 29, 1995 deposition. Moreover, Dr. Ponemon failed to produce the articles and other documentation related to the articles that were in his possession at that time, notwithstanding the clear scope of Plaintiff's notice of deposition duces tecum.

Dr. Ponemon's own thoughts and statements, they are statements offered as party admissions and are therefore admissible nonhearsay. *See* Fed. R. Evid. 801(d)(2)(A). *Cf. Estate of Shafer v. Commissioner*, 749 F.2d 1216, 1219 (6th Cir. 1984) (letter written by and containing statements of party admissible under 801(d)(2)(A)). Moreover, to the extent that the letters include some statements by third parties, it is clear that Plaintiff is not offering the letters for the truth of the matter asserted in those third party statements. As a result, those third party statements are not hearsay[17]. *See* Fed. R. Evid. 801(c).

The Court also agrees with Plaintiff that the remaining documents — including letters from the editorial staff and reviewers' comments on behalf of The CPA Journal — are admissible under the business records exception to the hearsay rule. A record is admissible under Rule 803(6) "if kept in the course of a regularly conducted business activity," "it was the practice of that business activity to make the . . . record," and circumstances do not "indicate lack of trustworthiness." Fed. R. Evid. 803(6). *See, e.g., United States v. Metallo*, 908 F.2d 795, 799 (11th Cir. 1990), *cert. denied*, 503 U.S. 940, 112 S. Ct. 1483, 117 L. Ed. 2d 625 (1992). The reviewers' comments are made and kept in the ordinary course of business of The CPA Journal, a peer review journal that regularly engages in evaluations of articles submitted to it for publication. Moreover, James Craig, Managing Editor for The CPA Journal, properly authenticated each of the documents as business records (*see* Craig Dep., Pl.'s Ex. A to Doc. 146). There is no indication in the record that any of these documents are unreliable. Accordingly, they also survive Defendants' hearsay challenge.

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17. Plaintiff is only offering the letters to prove that Dr. Ponemon submitted the article in question to The CPA Journal. All statements relevant to this fact were made by Dr. Ponemon.

Finally, the remaining issues are whether some of the documents in question — namely, the reviewers' comments on Dr. Ponemon's article — contain expert testimony, and if so, whether these documents should be excluded for Plaintiff's failure to comply with Fed. R. Civ. P. 26(e). In evaluating these questions, it is worth noting that a "trial judge has broad discretion in the matter of the admission or exclusion of expert evidence" and will only be overturned if his action is "manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 1122, 8 L. Ed. 2d 313 (1962).

The Court finds that the documents have not been offered as expert testimony. Rather, the documents have been submitted by Plaintiff Miller as evidence of negative peer review of Dr. Ponemon's article by reviewers of The CPA Journal. The Supreme Court has expressly held, in the context of scientific evidence, that submission to a peer reviewed journal[18] is one of several factors to be considered by district courts in ascertaining whether the methodology underlying the proffered conclusions is sufficiently reliable to warrant admission of the testimony[19].

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18. "Peer reviewed journal" generally refers to one in which an author submits a manuscript that is reviewed by outsider experts selected by the journal, who criticize the article and send the author their comments. An article is accepted for publication only after peer review is satisfied. *United States v. Bonds*, 32 F.3d 540, 559-60 n.16 (6th Cir. 1993).

19. Peer review and the other *Daubert* factors are generally irrelevant for non-scientific expert knowledge. *See, e.g., United States v. Starzecpyzel*, 880 F. Supp. 1027, 1040 (S.D.N.Y. 1995). However, where, as here, the expert has submitted his opinions to a peer review publication, the results of the peer review process would be relevant to the weight the expert's opinions should be given — particularly since they demonstrate the extent to which others in the expert's field have either accepted or rejected those opinions. It is in that vein that the Court considers the reviewers' comments concerning Dr. Ponemon's article.

Appendix B

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. __, 113 S. Ct. 2786, 2796-97, 125 L. Ed. 2d 469 (1993). The Court will duly consider the reviewers' comments in the evaluation of Dr. Ponemon's proffered expert testimony.

It should be noted in passing that even to the extent the reviewers' comments may be construed as expert opinions, Defendants will not be unfairly prejudiced by the Court's use of those opinions. Defendants had every opportunity to discover the existence of the materials in question *from their own retained expert witness*, Dr. Ponemon. The mere fact that Dr. Ponemon was not completely forthright with Defendants' counsel about the existence of his articles is no reason to exclude reviewer's comments pertaining to those articles. The Court therefore need not address any sanctions under Fed. R. Civ. P. 26(e).

For all the foregoing reasons, Defendants' motion to strike (Doc. 129) is DENIED.

III. Cross-Motions For Summary Judgment (Docs. 118 & 119):

A. Standard of Review:

A movant is entitled to summary judgment if he can show that "there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. "When reviewing cross motions for summary judgment, the court must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the non-moving party." *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994); *see United States v. Stafford*, 727 F.2d 1043, 1048 (11th Cir. 1984). In other words, "the standards upon which the

court evaluates the motions for summary judgment do not change simply because the parties present cross-motions." *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) (collecting cases).

B. Analysis:

The material facts of this action are undisputed. The parties only differ in their legal interpretations of whether the facts demonstrate cognizable claims under either the First or Fourteenth Amendments. Consequently, this case is best resolved by summary judgment.

1. Is "Holding Out" Speech Or Conduct?

The first issue that needs to be resolved is whether this case involves speech or conduct. Plaintiff Miller maintains that a prohibition on his right as an actively licensed accountant to "hold out" as a CPA when he works for an unlicensed accounting firm is a restriction on speech. Not surprisingly, Defendants and amici reach the opposite conclusion, arguing that the challenged regulations legitimately restrict professional conduct. Plaintiff Miller, as the person desiring to engage in allegedly protected speech, bears the burden of demonstrating the First Amendment applies. *E.g. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 n.5, 104 S. Ct. 3065, 3069 n.5, 82 L. Ed. 2d 221 (1984) .

Plaintiff Miller has met his burden. There can be little question that this case involves speech, not conduct. Plaintiff is an actively licensed accountant in Florida, and can therefore use the designation "C.P.A." *See* Fla. Stat. § 473.322(1)(b). In his capacity with TBS, Plaintiff lawfully provides tax and

business services requiring use of his accounting skills. *See* Fla. Stat. § 473.322(c). However, as soon as Plaintiff "holds out" by informing clients or potential customers of TBS that he is a CPA, he is unlawfully "practicing public accounting." *See* Fla. Stat. §§ 473.302, 473.322. The only difference between lawful and unlawful action is communication. Consequently, the statutory restriction on "holding out" is nothing more than a restriction on advertising, cloaked under the guise of the regulation of professional conduct.

Although "holding out" is treated as conduct in the context of Florida's statutory regulation of the accounting profession, the Court is not bound to accept that label. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 336, 9 L. Ed. 2d 405 (1963). *See also Bigelow v. Virginia*, 421 U.S. 809, 826, 95 S. Ct. 2222, 2235, 44 L. Ed. 2d 600 (1975) ("a court may not escape the task of assessing the First Amendment interest at stake" merely because the label the State has placed upon the speech in question). Where what masquerades as a regulation of professional conduct in general is in reality a regulation of communicative conduct or speech, the Court must examine the regulation under the auspices of the First Amendment. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 404-05, 109 S. Ct. 2533, 2539-40, 105 L. Ed. 2d 342 (1989) (collecting cases). *Cf. Edenfield v. Fane*, 507 U.S. __, 113 S. Ct. 1792, 1797, 123 L. Ed. 2d 543 (1993) (rule of professional conduct prohibiting in-person solicitation by CPAs was nothing more than ban on a category of commercial speech, thereby implicating the First Amendment).

The Supreme Court has already found that an actively licensed accountant's use of the CPA designation is commercial

speech. *See Ibanez v. Florida Bd. of Accountancy*, 114 S. Ct. 2084, 2088, 129 L. Ed. 2d 118 (1994) ("The Board *correctly acknowledged* that Ibanez' use of the CPA and CFP designations was 'commercial speech.' ") (emphasis added)[20], Accordingly, Plaintiff Miller falls under the full panoply of constitutional protection for commercial speech.

2. First Amendment Protection of Commercial Speech:

In a long line of cases, the Supreme Court has consistently held that commercial speech, as applied to the States through the Fourteenth Amendment, is protected under the First Amendment[21]. While commercial speech "does no more than

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20. It is somewhat disingenuous for Defendants and amici to suggest otherwise in the case at bar. In *Ibanez*, the plaintiff was an actively licensed accountant who was disciplined by the Board for referring to her CPA and CFP (Certified Financial Planner) credentials in her advertising and communications with the public concerning her law practice. 114 S. Ct. at 2086. The Board acknowledged in that case that it was regulating commercial speech. *Id.* at 2088. Notwithstanding that fact, the Defendant Board and amici would have the Court hold in the case sub judice — involving a challenge to the same regulatory scheme by a plaintiff who, like the *Ibanez* plaintiff, is an actively licensed accountant — that the "holding out" limitation merely regulates professional conduct, and not speech. The Court declines to take such an approach.

21. *See, e.g., Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); *Ibanez*, 114 S. Ct. at 2084; *Edenfield*, 113 S. Ct. at 1792; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); *Central Hudson Gas & Elec. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); *Bigelow*, 421 U.S. at 809, 95 S. Ct. at 2222.

propose a commercial transaction," *Virginia Pharmacy Bd.*, 425 U.S. at 762, 771 n.24, 96 S. Ct. at 1825-26, 1830 n.24, it is still a valued form of communication. Commercial speech is vital to the economic and societal interests in a free market system because it provides "the fullest possible dissemination of information" concerning available products and services. *Central Hudson*, 447 U.S. at 561-62, 100 S. Ct. at 2349; *Bates*, 433 U.S. at 364, 97 S. Ct. at 2699. Moreover, "[a]dvertising, though entirely commercial, may often carry information of import to significant issues of the day." *Id.* Consumers therefore have a substantial interest in maintaining the free flow of commercial speech. *See, e.g., Virginia Pharmacy Bd.*, 425 U.S. at 757, 96 S. Ct. at 1823. *See also Bates*, 433 at 364, 97 S. Ct. at 2699 ("[T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.").

Nevertheless, the Court has distinguished commercial speech from expressive or non-commercial speech. "For expressive or non-commercial speech — in which society has an interest wholly apart from the speaker's or listener's economic interests — the government's regulation or suppression of speech . . . [is] subject to strict scrutiny." *Abramson v. Gonzalez*, 949 F.2d 1567, 1574 (11th Cir. 1992). On the other hand, to ensure that protection for expressive non-commercial speech will not be "diluted[22]," restrictions on commercial speech are subject to

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22. The Court has reasoned in this context that "requir[ing] a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 481, 109 S. Ct. 3028, 3035, 106 L. Ed. 2d 388 (1989) (citing *Ohralik*, 436 U.S. at 456, 98 S. Ct. at 1919). This is particularly true with professions

(Cont'd)

intermediate scrutiny. As a result, in commercial speech cases, the Government must demonstrate a substantial interest and show that the desired restrictions are reasonably tailored to address that interest. *Ibanez*, 114 S. Ct. at 2088-89 (collecting citations).

3. *Central Hudson* Analysis:

In *Central Hudson*, the Court established a four-part test to determine whether a restriction on commercial speech is constitutionally valid under intermediate scrutiny. The four parts are: (1) the speech must be truthful and concern lawful activity; (2) the government must have a substantial interest in restricting the speech; (3) the regulation must directly advance the asserted governmental interest; and (4) the regulation must be narrowly tailored to serve the governmental interest[23]. 447 U.S. at 566, 100 S. Ct. at 2351. Defendants, as the parties seeking to uphold a restriction on Plaintiff Miller's commercial speech, carry the burden of justifying that restriction under the *Central Hudson* framework. *Edenfield*, 113 S. Ct. at 1800 (collecting citations)..

(Cont'd)
that have traditionally been subject to extensive regulation by the States; hence, it is all the more appropriate to generally limit scrutiny of such regulations "to a level commensurate with the 'subordinate position' of commercial speech in the scale of First Amendment values." *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2381 (citations omitted).

23. The Court modified the fourth prong of the *Central Hudson* analysis in *Fox*, noting that the proper inquiry is whether there is a reasonable "fit" between the State's ends and the narrowly tailored means used to accomplish those ends. *Fox*, 492 U.S. at 478, 480, 109 S. Ct. at 3033-34. This standard is "something short of a least-restrictive-means standard." *Id.* at 477, 109 S. Ct. at 3033.

2. Is the speech truthful and does it concern lawful activity?

Not all commercial speech is protected. Since the First Amendment's concern for commercial speech is based on its informational function, the government may ban all false or deceptive forms of communication, as well as speech related to unlawful activity. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350 (citations omitted). *See also Virginia Pharmacy Bd.*, 425 U.S. at 771, 96 S.Ct. at 1830 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."). A total ban is only permissible where the commercial speech is actually or inherently misleading, rather than potentially misleading. *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110, 110 S. Ct. 2281, 2292-93, 110 L. Ed. 2d 83 (1990).

In the case at bar, Plaintiff Miller maintains that the statement that he is a "C.P.A." is a truthful, verifiable fact. Defendants reach the opposite conclusion:

> It is inherently and inevitably misleading for a licensed CPA or any professional to perform professional services within the definition of those professions, advertise the fact of licensure, but not be in compliance with the profession's regulatory requirements for providing the services. The public will not be able to distinguish a CPA who is practicing public accounting and fully complying with Chapter 473 from a CPA who is not .... The fact that Miller seeks to advertise his CPA status while he refuses to

> meet Florida's requirements relating to firm licensure, shareholder, and professional service corporations, for which he would be sanctioned for non-compliance, makes these solicitations false and deceptive.

Doc. 131 at 21-24 (internal citations omitted). In sum, Defendants and amici draw a distinction between having an active accounting license and being able to lawfully provide accounting services that are directly regulated by the State. They conclude that if Plaintiff Miller were allowed to hold out that as a CPA in his capacity with TBS, his provision of unregulated nonattest tax and business services[24] would actually or inherently mislead the public into believing that those services and TBS were, in fact, regulated by the Board.

The Court declines to adopt Defendants' position. All Plaintiff Miller wants to do is inform his clients and potential customers the truthful, verifiable fact that he is a certified public accountant holding an active accounting license.

The Court agrees with Plaintiff that the type of information Plaintiff seeks to convey — certification and active licensure by the Board — makes this case indistinguishable from *Peel* and *Ibanez*. In *Peel*, the Supreme Court addressed the issue of whether an attorney's advertisement of his certification as a trial specialist by the National Board of Trial Advocacy ("NBTA") was actually or inherently misleading. Finding that it was not, the Court noted that

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24. Namely, those services requiring the use of accounting skills that may lawfully be provided by individuals or firms not holding active accounting licenses. *See* Fla. Stat. §§ 473.302(5)(b), 473.322(c).

> [a] lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.

Peel, 496 U.S. at 101, 110 S. Ct. at 2288 (internal citation omitted). Similarly, the Court found in *Ibanez* that "as long as *Ibanez* holds an active CPA license from the Board we cannot imagine how consumers can be misled by her truthful representation to that effect." 114 S. Ct. at 2089. The same reasoning has equal effect in the case at bar.

Moreover, Defendants have wholly failed to produce evidence that consumers will be misled as they have suggested. To meet their burden, Defendants have submitted expert reports by Louis Doone and Gary Holstrum. These reports lack any empirical basis on the issue before the Court, and indeed, contain nothing more than self-serving conclusory statements. Some of the reports contain results of a 1986 Louis Harris Poll of consumer attitudes towards CPAs and the accounting profession; however, the 1986 Poll did not specifically address the issue at bar. Indeed, notwithstanding the fact that some states permit

CPAs working at unlicensed firms to hold out, Defendants' experts were unaware of any empirical studies that had found consumers would be misled by such practices (*see* Holstrum Dep. at 123; Ponemon Dep. at 126-27; Doc. 128 at ¶¶ 21-23)[25].

Defendants provide some evidence that supports the firm licensure requirements. Defendants first submit examples of disciplinary actions taken against individuals and firms who have violated various regulatory and professional standards — including the provision of nonattest services specified in Fla. Stat § 473.322(c) — as anecdotal evidence of the need for the existing regulatory scheme. Defendants also submit a report prepared by Dr. Ponemon, an expert on ethics in the accounting profession, which states that 100% CPA ownership of accounting firms protects consumers by increasing the likelihood of compliance with professional and regulatory standards[26]. However, none of this evidence shows how it would be actually or inherently misleading for Plaintiff Miller to hold himself out as a CPA.

In addition, Defendants' position is further undermined by the Board's past decisions to allow active licensees working at

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25. Defendants misapprehend their burden under *Central Hudson* when they note "that Plaintiffs and their experts are similarly unaware of any studies that have been done which would show that consumers are not misled" (Doc. 128 at ¶ 23).

26. Dr. Ponemon's report is similar to an article he submitted for publication in The CPA Journal. However, after receiving negative peer review from other CPAs, the Managing Editor, James Craig, rejected Dr. Ponemon's article. According to Craig, Dr. Ponemon was "mixing apples and oranges when dealing with the issue of holding out versus the practice of public accounting" (Pl.'s Ex. I).

unlicensed firms to hold themselves out as CPAs. For example, Defendants stipulate, in keeping with an agreement reached in *Ibanez v. Board of Accountancy, et al.*, No. TCA 91-40471-WS (Stafford, J., Aug. 16, 1995), that "Florida law does not in all circumstances prohibit certified public accountants who are members of law firms from holding out as CPAs in the course of their law practice" (Pretrial stipulation at ¶ 3). Defendants also acknowledge that in a letter dated July 9, 1982, the Board[27] specifically approved holding out under the same circumstances presented in the instant case:

> Q: What are the requirements for a CPA who is employed by a firm which provides financial statements, including bookkeeping, accounting, forecasting, financial statements without audit or review and consulting and that firm is not a CPA firm. In addition, can the CPA use the CPA designation on letters or other items sent out under the firm's name?
>
> A: A CPA has to use CPA when he is attesting. Yes, *he may append CPA to his name or letters or other items sent out under the firm's name.* He cannot, however, be a principle in the firm. The firm cannot hold itself out as being a CPA firm in any manner, shape, or form. The CPA cannot be involved in any matters which he, as a CPA, cannot be involved in. This would apply to items such as forecasting.

July 9, 1982 official opinion letter from the Board, Pls.' Ex. 18

27. Including Defendants' expert, Louis Dooner, who as Chairman of the Board at that time voted to ratify the official opinion (*see* Doc. 128 at ¶ 30).

(*under seal*) (emphasis added)[28]. Such exemptions "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994); *see also Peel*, 496 U.S. at 107, 110 S. Ct. at 2291 (same).

Defendants' reliance on *Florida Bar v. Went For It, Inc.* for the proposition that they can rely on nothing more than "history, consensus, and simple common sense" to establish real harm, is simply misplaced. In *Went For It*, the State submitted substantial anecdotal evidence and the results of a study on the very issue before the Court. 115 S. Ct. at 2377-78. It was only in the face of this large body of evidence that the Court concluded it was unnecessary for the State to submit the background information underlying that evidence. *Id.* at 2378-79. In contrast, Defendants in the case at bar have presented no evidence of real or potential harm, from Florida or any other state.

The State carries the burden of showing that its restriction is no more extensive than necessary to further its substantial interest in protecting the consumer from potentially misleading information. The Supreme Court has made it clear that the burden of showing real harm "is not satisfied by mere speculation or conjecture." *E.g.*, *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2377; *Rubin v. Coors Brewing Co.*, 514 U.S. __, 115 S. Ct. 1585, 1592, 133 L. Ed. 2d 532 (1995); *Edenfield*, 113 S. Ct. at 1800. Yet speculation and conjecture is all that Defendants have offered.

Even if the Court assumes that an actively licensed accountant in an unlicensed firm who holds out as a CPA may

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28. Defendants characterize this opinion as an aberrational decision, and an incorrect statement of the Board's present policy (Doc. 128 at ¶ 29).

be potentially misleading to some consumers, "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Peel*, 496 U.S. at 109, 110 S. Ct. at 2292. *See also Ibanez*, 114 S. Ct. at 2090 ("[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' ") (quoting *Edenfield*, 113 S. Ct. at 1800). As a result, the holding out restriction can only withstand constitutional scrutiny if Defendants satisfy the rest of the *Central Hudson* factors.

b. Do Defendants have a substantial interest in restricting the speech?

Defendants have suggested the following substantial interests in restricting Plaintiff Miller's speech: first, protecting consumers from unqualified accountants through maintenance of a professional and regulatory scheme over individual accountants and accounting firms, and the accounting services they provide; and second, ensuring the accuracy of commercial information disseminated to consumers (Doc. 131 at 18). These interests are substantial. *See generally Edenfield*, 113 S. Ct. at 1799-1800 (states have substantial interest in ensuring accuracy of commercial information in marketplace); *Gade*, 505 U.S. at 108, 112 S. Ct. at 2388 (states have broad power to establish standards for licensing practitioners and regulating practice of professions in the interest of the public welfare).

c. Does the restriction directly advance the interests asserted by Defendants?

As already discussed, it is unclear that the restriction on holding out is even necessary. First, Defendants have submitted

no proof that consumers are even potentially misled by accountants at unlicensed firms holding themselves out as CPAs. Second, Defendants have also failed to show that such holding out in any way undermines the state's regulatory scheme for the accounting profession. Nevertheless, for the sake of argument the Court will assume that the harms put forward by Defendants are potentially real, and the absolute bar that prevents accountants at unlicensed firms from holding out as CPAs may prevent these conceivable harms.

d. Is there a reasonable fit between the restriction and the interest asserted by Defendants?

"Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon advertising may be no broader than reasonably necessary to prevent the deception." *In re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937, 71 L. Ed. 2d 64 (1982). *Accord Fox*, 492 U.S. at 476, 109 S. Ct. at 3032 (same). *See generally Edenfield*, 113 S. Ct. at 1803-04 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citation omitted). Therefore, the remaining inquiry under *Central Hudson* is whether there is a reasonable "fit" between Defendants' ends and the narrowly tailored means chosen to accomplish those ends. *Fox*, 492 U.S. at 480, 109 S. Ct. at 3034. In conducting this inquiry, "if there are numerous and obviously less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13, __ L. Ed. 2d __ (1993).

Defendants argue that there is a reasonable fit between the challenged restriction and their substantial interests. According to Defendants,

> Miller would be in a worse position if Florida did not utilize a "holding out" trigger. If Florida found that Miller and other CPAs were engaged in the practice of public accounting merely because they have a CPA license and are doing accounting and tax work, the result would be that Miller and other CPAs could not work for firms like TBS as licensed CPAs because they would be providing accounting services as CPAs in an unlicensed firm. Thus, Florida's definition of public accounting actually has the effect of narrowing the scope of regulation.

Doc. 131 at 14 (citations omitted). Defendants maintain that "[t]he restrictions are tailored narrowly so as to permit a CPA to advertise his license in connection with providing accounting services, so long as he complies with Chapter 473" (*Id.* at 37). Defendants therefore conclude that the challenged restriction passes the *Central Hudson* analysis, and survives constitutional scrutiny.

The Court cannot agree with Defendants' reasoning. While a total ban on actively licensed accountants holding themselves out as CPAs when working at non-accounting firms may directly advance the State's interest, it is far more extensive than is necessary to serve the interest of protecting consumers from any potential harm. The mere fact that the state could have imposed even more restrictive limitations on Plaintiff Millers'

commercial speech, does not necessarily mean the limitations actually imposed can pass constitutional muster.

The excessive scope of the holding out restriction is best demonstrated by some examples. Plaintiff Miller is an actively licensed accountant in good standing with the Board, who performs nonattest tax and business services at TBS, an unlicensed accounting firm. Plaintiff Miller is understandably proud or attaining his accountant license, and therefore has it framed and hung up on the wall of his office at TBS. A potential client then comes into Plaintiff Miller's office, seeking only the nonattest tax and business services that Miller may lawfully provide at TBS. Plaintiff Miller says nothing to the potential client about his qualifications to provide such services. Nevertheless, Plaintiff Miller has unlawfully held out as a CPA, in violation of Florida Statutes §§ 473.302, 473.308- .309, and 473.322. *See generally* Fla. Admin. Code r. 61H1-24.001(2)(a)(5) ("advertising," for purposes of holding out restriction, includes written statement disseminated to or before the public, including display of accounting certificate or license from Florida or any other state).

In fact, Plaintiff Miller has already unlawfully held out through some of his written and oral statements in these court proceedings. Plaintiff Miller has repeatedly used the CPA designation in this action with the intent of "furthering the purpose, either directly or indirectly, of . . . inducing members of the public to enter into any obligation relating to such public accounting services" in Plaintiff's capacity with TBS, an unlicensed accounting firm. Fla. Admin. Code r. 61H1-24.001(2)(a)(14). These actions are in violation of Florida Statutes §§ 437.302, 473.308- .309, and 473.322.

Similarly, Dr. Gary Holstrum, one of Defendants' own experts, has unlawfully held out in these proceedings in violation of the same statutory provisions. Dr. Holstrum's curriculum vitae states that he holds professional certification as a CPA in Texas. However, Florida's statutory scheme makes it clear that an individual holding a license in another state may not hold out as a CPA unless they are actively licensed in Florida. *See* Fla. Stat. §§ 437.302, 473.308, 473.322.

These examples make it clear that the restriction on holding out far exceeds the substantial interests Defendants are trying to further; namely, protection of consumers and ensuring the accuracy of commercial information disseminated to consumers. A state "may not place an absolute prohibition on . . . potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203, 102 S. Ct. at 937. When, as here, truthful commercial speech might be potentially misleading, "the preferred remedy is more disclosure, rather than less." *Bates*, 433 U.S. at 375, 97 S. Ct. at 2704-05. *Accord Abrahmson*, 949 F.2d at 1576 (same). The proper remedy is therefore "not necessarily a prohibition but preferably a requirement of disclaimers or explanation," *In re R.M.J.*, 455 U.S. at 203, 102 S. Ct. at 937, which can best protect both the interests of the state and the advertiser, *cf. Zauderer*, 471 U.S. 651, 105 S. Ct. at 2282 ("an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").

In fact, Florida's regulatory scheme already requires that accountants and non-accountants disclose additional information whenever there is a possibility consumers might be misled by their advertisements. For example, licensees cannot

Appendix B

> . . . disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
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> (a) Contains a misrepresentation of facts; or
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> (b) Makes only a partial disclosure of relevant facts; or
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> (c) Creates false or unjustified expectations of beneficial assistance; or
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> . . . .
>
> (e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or
>
> (f) Contains any other representation, statement, or claim which misleads or deceives
>
> . . . .

Fla. Admin. Code r. 61H1-24.001(1) (1995). When indicating membership or affiliation in an accountant association, unlicensed individuals are required to include the words "Not registered with the Board of Accountancy," or similar words in letters or equal size and prominence to those indicating

membership or affiliation. Fla. Admin. Code r. 61H1-34.002 (1993). *See Dandelake*, 98 So. 2d at 329 (since such membership or affiliation by non-accountants might tend to mislead the public, state can reasonably require such a disclaimer). *See generally Zauderer*, 471 U.S. at 651, 105 S. Ct. at 2282 ("an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."). Failure to correct any public misperceptions about the nature of a licensee's association or firm or the services provided by the licensee would subject the licensee to discipline by the Board. *See* Fla. Stat. § 473.323 (1994). *See also* Fla. Admin. Code r. 61H1-26.001(1) (1993) (a licensee "shall not practice under a name which is misleading or deceptive as to the legal form of the firm"); r. 61H1-36.001(1) (1993) (providing for discipline if licensee has made misleading or deceptive representations). Similarly, non-licensees engaging in deceptive advertisement would be subject to sanctions pursuant to Florida Statutes § 473.322.

Defendants are simply wrong in concluding that CPAs working at unlicensed accounting firms, such as Plaintiff Miller, are unregulated by the State. Plaintiff Miller, like all other actively licensed accountants who may use the "C.P.A." designation, is subject to oversight by the Board[29] (Holstrum Dep. at 66-70). *See generally* Fla. Stat. § 473.304(1) ("Every licensee shall be governed and controlled by this act and the rules adopted by the board."). To the extent that Plaintiff Miller could potentially mislead the public by holding out as a CPA at TBS, he would be required under the existing regulatory

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29. Plaintiff's expert, William Raby, also correctly points out that all CPAs engaged in tax practice are subject to regulation by the Internal Revenue Service (*see* Raby Report at 7-9 and Attach. Exs.).

framework to include additional disclosure concerning the unlicensed status of TBS and the nature of the services that Miller can lawfully provide in his capacity with TBS.

In sum, the Court finds that a disclaimer or some other form of additional disclosure is a narrower limitation that would allow Plaintiff Miller to hold himself out as a CPA in a non-misleading manner[30]. *See Peel*, 496 U.S. at 109-11, 110 S. Ct. at 2292-93. A state cannot "completely suppress the dissemination of concededly truthful information about entirely lawful activity," such as is the case here, merely because the state is "fearful of that information's effect upon its disseminators and its recipients." *Virginia Pharmacy Bd.*, 425 U.S. at 773, 96 S. Ct. at 1831. Rather, it is more beneficial to protect the public's right to make an informed decision about the services they purchase through full disclosure of all relevant information. *See, e.g., Peel*, 496 U.S. at 109-11, 110 S. Ct. at 2292-93. *Virginia Pharmacy Bd.*, 425 U.S. at 770, 96 S. Ct. at 1829. Consequently, Defendants have failed to satisfy their burden under *Central Hudson*, and the Court must therefore hold that the restriction on holding out is unconstitutional as applied to Plaintiff Miller, and others similarly situated.

Based on the foregoing, it is unnecessary to address the equal protection challenge raised by Plaintiff Miller.

IV. Conclusion:

It is important to emphasize that this is a very narrow decision. The Court is not saying that the state cannot lawfully

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30. Of course, if the state decides to require a disclaimer, it cannot be so burdensome on the speaker as to effectively abrogate the speaker's constitutional right to engage in such commercial speech. *See Ibanez*, 114 S. Ct. at 2090-91.

restrict unlicensed individuals or firms, pursuant to Title Acts[31], from using certain professional designations. Nor is the Court saying that the state cannot lawfully regulate the practice of professions by individuals or firms. Rather, the Court merely finds that under the facts of this case, the state's absolute ban on holding out the CPA designation by actively licensed accountants at unlicensed firms, cannot be sustained under the First Amendment.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The motions by The Florida Institute of Certified Public Accountants and The American Institute of Certified Public Accountants for leave to file briefs as amici curiae (Docs. 134 & 135) are GRANTED.

2. American Express Tax and Business Services, Inc. ("TBS") lacks standing to make the asserted constitutional challenge, and is DISMISSED as a party plaintiff.

3. Defendants' motion to strike (Doc. 129) is DENIED.

4. Defendants' motion for summary judgment (Doc. 119) is DENIED.

5. Plaintiffs' motion for summary judgment (Doc. 118) is GRANTED IN PART. Having dismissed Plaintiff TBS as a party

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31. Title Acts "regulate the practice of a profession by prohibiting unqualified individuals from using titles associated with licensed professionals." *Abramson*, 949 F.2d at 1584 (Cox, J., concurring in part and dissenting in part). *See Ibanez*, 114 S. Ct. at 2087 n.3.

plaintiff, summary judgment is only granted for Plaintiff Stephen Miller.

6. The Court holds that, as applied to Plaintiff Miller and other similarly situated individuals, the enforcement of Florida Statutes §§ 473.302(5), 473.309, and 473.322, violate the First Amendment to the Constitution of the United States, to the extent that those laws prohibit a CPA employed by an unlicensed accounting firm and performing only nonattest business services of the kind identified in Florida Statute § 473.302(5)(b) from truthfully informing clients or prospective clients that he or she is a CPA.

7. Defendants are permanently enjoined from enforcing Florida Statutes §§ 473.302(5), 473.309, and 473.322, to the extent that those laws prohibit a CPA employed by an unlicensed accounting firm and performing only nonattest business services of the kind identified in Florida Statute § 473.302(5)(b) from truthfully informing clients or prospective clients that he or she is a CPA. This injunction is to remain in full force and effect until further order of the Court.

DONE AND ORDERED this 10*TH* day of December, 1995.

s/ Maurice M. Paul
MAURICE M. PAUL, CHIEF JUDGE

APPENDIX C — OPINION OF THE UNITED STATES FOR THE NINTH CIRCUIT IN THE MATTER OF *JOHNSON v. CALIFORNIA STATE BD. OF ACCOUNTANCY*, 72 F.3d 1427 (9th Cir. 1995) DECIDED DECEMBER 29, 1995

Ross A. JOHNSON, Plaintiff-Appellant,

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY, et al., Defendants-Appellees.

No. 92-16433.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 14, 1993.

Submission Vacated April 19, 1994.
Resubmitted July 6, 1994.
Memorandum Filed July 25, 1995.
Decided Dec. 29, 1995.

* * *

Norman C. Hile, Raul A. Ramirez, and Kathryn Doi, Orrick, Herrington & Sutcliff, Sacramento, California, for plaintiff-appellant.

Daniel E. Lungren, Atty. Gen. of the State of Cal.; Joel S. Primes, Supervising Deputy Atty. Gen., Sacramento, CA, on Briefs; Michael R. Granen, Deputy Atty. Gen., Los Angeles, CA, Oral Argument, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

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Before: POOLE, BEEZER and KLEINFELD, Circuit Judges.

ORDER

The Defendant-Appellee's request for publication pursuant to Ninth Circuit Rule 36-2 is hereby GRANTED. Accordingly, all third-party requests for publication are also hereby GRANTED. The memorandum disposition filed July 25, 1995 in the above-captioned matter is redesignated as an authored opinion by Judge Cecil F. Poole.

OPINION

POOLE, Circuit Judge:

Ross A. Johnson appeals the district court's denial of his motion for a preliminary injunction. Johnson, who has been a certified public accountant (CPA) since 1974, sought to enjoin the California State Board of Accountancy (the Board) from investigating and disciplining him for violations of California Business and Professions Code § 5061.[1] Section 5061 prohibits those engaged in the practice of public accountancy from accepting commissions. Johnson alleges that California's prohibition on commissions is triggered by Johnson's use of constitutionally protected speech and therefore should be subject to a strict scrutiny test. Johnson argues that the district court erred in denying his motion for preliminary injunction because it erroneously applied a rational basis test rather than strict scrutiny. Because the district court correctly determined that

1. All statutory references herein are to California's Business and Professions Code unless otherwise noted.

Johnson did not have a fair chance of success on the merits, we affirm its denial of Johnson's motion for a preliminary injunction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute the facts. The Board has licensed and certified Johnson to practice public accountancy in California. The State of California has also licensed Johnson to sell real estate and insurance. The National Association of Securities Dealers has given Johnson licenses to sell securities. Johnson is affiliated with H.D. Vest Investment Securities, Inc., of Irving, Texas, a registered broker/dealer.

Johnson operates a solo accountancy practice in Sacramento, California. He regularly identifies himself as a CPA on his letterhead and business cards. Johnson does not perform audits or issue opinions requiring him to attest to the reliability, fairness, or accuracy of financial information. He regularly accepts commissions for the sale of real estate and the referral of investment products to his accounting clients.

Johnson requires all his clients to read and sign annually a letter which states that he receives cash commissions for the sale of investment securities and financial products, and that the client has no obligation to follow his recommendations. According to the Board of Accountancy, Johnson received over $40,000 in commissions during 1990-92 for the referral of investment products in limited partnerships in gas and oil leases, real estate, mortgage equipment leasing and mutual funds to his accounting clients. He also received over $29,000 in commissions during the same time period for referral of real estate products to his clients.

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On July 25, 1991 the Board informed Johnson by letter that they were investigating him for possible violations of Section 5061. The parties eventually agreed to an investigatory interview in November 1991. On September 18, 1991 Johnson filed this action in the Eastern District of California. On September 20, 1991 Johnson moved for a preliminary injunction pending trial to prevent the Board from taking further investigatory or disciplinary action against him. The Board suspended action pending the district court's decision on the motion.

The district court denied the motion for a preliminary injunction on July 15, 1992 concluding that Johnson was not likely to succeed on the merits. Johnson filed this appeal on July 28, 1992. Johnson subsequently filed motions for a stay pending appeal with the district court and the court of appeals. The district court denied the motion on August 11, 1992 and this court denied the motion on August 24, 1992.

On November 9, 1992 the Board filed an Accusation against Johnson, charging him with unprofessional conduct for his violation of Section 5061. Hearings regarding the Accusation against Johnson were held before an Administrative Law Judge on June 14, June 15, July 14, July 22 and October 18, 1993.

We heard oral argument on December 14, 1993. The Supreme Court subsequently heard and decided Ibanez v. Florida Dep't of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994), the case of an attorney/accountant/financial planner reprimanded by a state accountancy board under a similar statutory scheme. We vacated submission on April 19, 1994 in order to obtain the benefit of the Supreme Court's latest decision regarding commercial speech and regulated professions. In the

meantime, on June 7, 1994, the Board adopted the extensive findings of the Administrative Law Judge and decided to discipline Johnson for accepting commissions by suspending Johnson's CPA license effective July 7, 1994. After the Board denied Johnson's petition for reconsideration he filed an emergency motion for a stay and a preliminary injunction of the Board's disciplinary action. We denied Johnson's emergency motion and resubmitted the case on July 6, 1994.

II. DISCUSSION

A. Standard of review

The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court. We will reverse "only if the district court relied on an erroneous legal premise or abused its discretion." Sports Form, Inc. v. United Press Int'l, 686 F.2d 750, 752 (9th Cir.1982). See also Religious Technology Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1309 (9th Cir.1989). Because the test for a preliminary injunction is "probable success on the merits" or "fair chance of success on the merits," our appellate decision "may provide little guidance as to the appropriate disposition on the merits." Sports Form, 686 F.2d at 753. Therefore, we do not reach the merits of the substantive determination of the free speech issue.

The question is limited to whether the district court abused its discretion in determining that Johnson's probability of success on the merits was low. Id. at 754. We hold that it did not.

B. Standards for preliminary injunctive relief

"The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the

merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." Dollar Rent A Car v. Travelers Indem. Co., 774 F.2d 1371, 1374 (9th Cir.1985). "Alternatively, a court may issue a preliminary injunction if the moving party demonstrates 'either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.' " Martin v. Int'l Olympic Comm., 740 F.2d 670, 675 (9th Cir.1984) (quoting William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir.1975) (emphasis in original)). Johnson urges this panel to focus on the second part of the alternative test because the balance of hardships tips sharply in Johnson's favor. However, Martin explicitly teaches that "[u]nder this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits." Martin, 740 F.2d at 675. Consequently, we focus on Johnson's chance of success on the merits by examining his constitutional claims.

C. Probability of success on the merits.

1. California's accountancy regulations

In order to evaluate Johnson's argument that the district court erred in denying his motion for a preliminary injunction, we must first analyze how California regulates accountants. California's Business and Professions Code, contains the licensing and disciplinary regulations governing the practice of accounting. See Cal.Bus. & Prof.Code §§ 5000-5173 (West 1990).

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Except for temporary practice by certified public accountants (CPAs), public accountants (PAs), or their equivalent from another jurisdiction, California prohibits the practice of public accountancy without a valid permit from the Board. Id. § 5050. Permits expire regularly every other year unless renewed. Id. § 5070.5 In order to receive the Board's certification as a certified public accountant a person must fulfill demanding educational and professional experience requirements (§§ 5081, 5081.1, 5083), as well as pass a certified public accountancy examination. Id. § 5082. After notice and hearing the Board has power to revoke, suspend, or refuse to renew any permit or certificate which it grants, or censure the holder of such a permit or certificate for unprofessional conduct. Id. § 5100. Unprofessional conduct includes "[w]illful violation of this chapter or any rule or regulation promulgated by the board under the authority granted under this chapter." Id. § 5100(f).

The Board has disciplined Johnson under Section 5061, which requires that "[n]o person engaged in the practice of public accountancy shall pay a commission to obtain a client, nor shall that person accept a commission for a referral to a client of products or services of others."

Section 5051 defines the practice of public accountancy.[2]

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2. Following is the entire text of Section 5051:

> § 5051. Practice of public accountancy Except as provided in Sections 5052, 5053, and 5054, a person shall be deemed to be engaged in the practice of public accountancy within the meaning and intent of this chapter if he or she does any of the following:
>
> (a) Holds himself or herself out to the public

(Cont'd)

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(Cont'd)

in any manner as one skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation.

(b) Maintains an office for the transaction of business as a public accountant.

(c) Offers to prospective clients to perform for compensation, or who does perform on behalf of clients for compensation, professional services that involve or require an audit, examination, verification, investigation, certification, presentation, or review, of financial transactions and accounting records.

(d) Prepares or certifies for clients reports on audits or examinations of books or records of account, balance sheets, and other financial, accounting and related schedules, exhibits, statements, or reports which are to be used for publication or for the purpose of obtaining credit or for filing with a court of law or with any governmental agency, or for any other purpose.

(e) In general or as an incident to that work, renders professional services to clients for compensation in any or all matters relating to accounting procedure and to the recording, presentation, or certification of financial information or data.

(f) Keeps books, makes trial balances, or prepares statements, makes audits, or prepares reports, all as a part of bookkeeping operations for clients.

(Cont'd)

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Section 5051 has nine subdivisions labelled (a) through (i), which describe various activities. Participation in any one of the activities described in subdivisions 5051(a) through 5051(e)

(Cont'd)

> (g) Prepares or signs as the tax preparer, tax returns for clients.
>
> (h) Prepares personal financial or investment plans or provides to clients products or services of others in implementation of personal financial or investment plans.
>
> (i) Provides management consulting services to clients.
>
> The activities set forth in subdivisions (f) to (i), inclusive, are "public accountancy" only when performed by a certified public accountant or public accountant, as defined in this chapter.
>
> A person is not engaged in the practice of public accountancy if the only services he or she engages in are those defined by subdivisions (f) to (i), inclusive, and he or she does not hold himself or herself out, solicit, or advertise for clients using the certified public accountant or public accountant designation. A person is not holding himself or herself out, soliciting or advertising for clients within the meaning of this section solely by reason of displaying a CPA or PA certificate in his or her office or identifying himself or herself as a CPA or PA on other than, signs, advertisements, letterhead, business cards, publications directed to chants or potential clients, or financial or tax documents of a client.

is sufficient to find that someone is engaged in the practice of public accountancy. Participation in any one of the activities described in subdivisions 5051(f) through 5051(i) is not sufficient to find that someone is engaged in the practice of public accountancy unless that person also holds himself or herself out as a CPA or a PA. Holding oneself out as a CPA or PA appears to be the substantial equivalent of the sufficient activity described in subdivision 5051(a). In other words, holding oneself out as a CPA or PA is a necessary condition for finding that those participating in activities described in subdivisions 5051(f) through 5051(i) are engaged in the practice of pu[illegible] accountancy; however, merely holding oneself out is sufficient in itself.

California's statutory scheme appears to serve a specific purpose. The activities described in subdivisions 5051(f) through 5051(i) are bookkeeping, tax return preparation, financial and investment planning, and management consulting. By including subdivisions 5051(f) through 5051(i) in the list of activities which constitute the practice of public accountancy, the legislature recognized that trained and certified accountants are increasingly called on to perform a wide range of financial services for their clients. By defining these activities in subdivisions 5051(f) through 5051(i) as the practice of public accounting only if a person performing them also holds himself or herself out as a CPA or a PA, the legislature further recognized that non-accountants regularly perform bookkeeping, tax return preparation, financial and investment planning, and management consulting. The legislature obviously did not want to bring every bookkeeper, tax lawyer, financial planner, and management consultant in the state under the accounting regulations.

Contrary to Johnson's argument, Section 5051 does not

create two separate classes of accountants on the basis of constitutionally protected speech. The distinction between the activities described in subdivisions 5051(a) through 5051(e) and those described in subdivisions 5051(f) through 5051(i) simply serves to exempt from the rigorous accountancy regulations those non-accountants who perform only the particular financial services noted in subdivisions 5051(f) through 5051(i), and who do not claim to be accountants in their " signs, advertisements, letterhead, business cards, publications directed to clients or potential clients, or financial or tax documents of a client." Id. § 5051. At the same time, it requires those accountants who want to perform these other financial services and continue to hold themselves out as accountants to adhere to California's numerous regulations regarding public accountancy.[3]

2. Protected speech or conduct

Johnson argues that holding oneself out as a CPA is constitutionally protected speech and that to deny someone

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3. Those practicing "public accountancy" are subject not only to a prohibition on commissions (§ 5061), but also to continuing education requirements (§ 5026, 5028), licensing requirements (§ 5050), which include registration and fees (§ 5070), limitations on the ability to form business partnerships (§ 5072), and separate and distinct administrative discipline for dishonesty, fraud, or gross negligence (§ 5100(c)). This non-exhaustive list refers only to statutes which explicitly use the term "public accountancy" in the literal way Johnson does.

Johnson makes much of the fact that holding oneself out does not refer to displaying a CPA or PA certificate in an office, or advertising ones qualifications by word-of-mouth. See id. § 5051 (last paragraph). The fact that California has not sealed off every avenue for accountants who do not undertake the rigorous requirements of the public accounting regulations to share their state-endowed credential does not create a constitutional deficiency.

commissions simply because he or she holds himself or herself out as a CPA unconstitutionally burdens a first amendment right.

Unlike the constitutionally infirm statutes in the cases cited by Johnson, Section 5051's "holding out" provisions do not ban dissemination of commercial information. Johnson cites Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir.1992), and Parker v. Kentucky, Bd. of Dentistry, 818 F.2d 504 (6th Cir.1987) for the proposition that "holding out" is commercial speech protected by the First Amendment.

Peel invalidated as applied an Illinois statute that prohibited an attorney from holding himself out as certified or as a specialist in any area other than patent, trademark and admiralty. The attorney who successfully challenged the statute had letterhead noting his certification as a Civil Trial Specialist from the National Board of Trial Advocacy. The plurality held that the state could not completely ban from commercial discourse statements that are not actually or inherently misleading "such as certification as a specialist by bona fide organizations." 496 U.S. at 110, 110 S.Ct. at 2293 (opinion of Stevens, J.). Justice Marshall's concurrence would permit a state to enact regulations other than a total ban on potentially misleading statements. Id. at 111, 110 S.Ct. at 2293.

In Abramson, the Eleventh Circuit held that as long as Florida permitted unlicensed psychologists to practice psychology it could not ban them from identifying or holding themselves out as such in their commercial speech. 949 F.2d at 1575-76.

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In Parker, the Sixth Circuit held that as long as Kentucky permitted general practitioner dentists to perform orthodontic and other specialized procedures it could not ban general practitioners from holding themselves out in their commercial speech as providing orthodontics or other specialized procedures if done in a way which did not deceive. 818 F.2d at 509-510.

The "holding out" statutes implicated in Peel, Abramson, and Parker are analytically distinct from the "holding out" provisions in Section 5051. In those prior cases "holding out" or its equivalent was used to ban the dissemination of commercial information. The Illinois Code of Professional Responsibility, Rule 2-105(a)(3) stated that "no lawyer may hold himself out as 'certified' or a 'specialist' " (cited in Peel, 496 U.S. at 97, 110 S.Ct. at 2286). The Florida statute in Abramson stated that "No person shall hold himself out [as a psychologist] . . . unless such person holds a valid active license under this chapter . . ." Fla.Stat.Ann. § 490.012(1)(a) (West 1994). The Kentucky statute in Parker stated that "No licensed dentist shall hold himself out to the public as being especially qualified in any branch of dentistry . . ." Ky.Rev.Stat.Ann. § 313.410 (Michie 1993).

Section 5051 imposes no such ban. It uses the equivalent of the phrase "holding out" to identify and define conduct indicative of the practice of public accountancy (e.g., "a person shall be deemed to be engaged in the practice of public accountancy . . . if he or she . . . [h]olds himself or herself out to the public in any manner as one skilled in the knowledge, science, and practice of accounting"). Section 5051 does not ban any commercial information. Under the provisions of Section 5051, as long as Johnson has not been disciplined for violations of the substantive provisions of California's

accountancy regulations, he can identify himself in advertising and letterhead as a CPA, and as licensed to sell real estate, insurance, and securities. Reading Sections 5051 and 5061 together, however, what Johnson is not permitted to do is to use his various professional licenses to engage in commission-yielding transactions that create a conflict between his interests and those of his client.

We do not review Johnson's arguments regarding the use of a strict scrutiny standard rather than the rational basis one employed by the district court, because we do not reach the merits of his argument. However, based on the foregoing discussion, we hold that the district court did not abuse its discretion in deciding that the probability of success on the merits was low. Therefore, the denial of Johnson's motion for a preliminary injunction is AFFIRMED.

APPENDIX D — CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . .

Fla. Stat. § 473.302 (1995)

473.302 Definitions. — As used in this chapter, the term:

(1) "Board" means the Board of Accountancy.

(2) "Department" means the Department of Business and Professional Regulation.

(3) "Division" means the Division of Certified Public Accounting.

(4) "Certified public accountant" means a person who holds a license to practice public accounting in this state under the authority of this chapter.

(5) "Practice of," "practicing public accountancy," or "public accounting" means:

(a) Offering to perform or performing for the public one or more types of services involving the expression of an opinion on

financial statements, the attestation as an expert in accountancy to the reliability or fairness of presentation of financial information, the utilization of any form of disclaimer of opinion which conveys an assurance of reliability as to matters not specifically disclaimed, the expression of an opinion on the reliability of an assertion by one party for the use by a third party, or the preparation of financial statements by a certified public accountant, a firm of certified public accountants, or a firm in which a certified public accountant has an ownership interest, including the performance of such services in the employ of another person; or

(b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public

accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

(6) "Holding out" means advertising, as a part of a licensee's business activities, that the licensee is a certified public accountant when providing, or offering to provide, services or products to the public which involve the use of accounting skills or one or more types of management advisory or consulting services.

* * *

Fla. Stat. § 473.309 (1995)

473.309 Practice requirements for partnerships, professional service corporations, and limited liability companies. —

(1) A partnership shall not engage in the practice of public accounting in this state unless:

(a) At least one general partner and each partner domiciled in this state is a certified public accountant of this state and holds an active license;

(b) Each partner is a certified public accountant in some state; and

(c) The partnership is currently licensed as required by s. 473.3101.

(2) A corporation shall not engage in the practice of public accounting in this state unless:

(a) It is a professional service corporation duly organized in this or any other state;

(b) Each shareholder of the corporation is licensed as a certified public accountant in some state and is principally engaged in the business of the corporation;

(c) The principal officer of the corporation and any officer or director having authority over the practice of public accounting by the corporation is a certified public accountant in some state;

(d) At least one shareholder of the corporation, and each shareholder, director, and officer domiciled in this state having authority over the practice of public accounting by the corporation, is a certified public accountant and holds an active license in this state;

(e) It is in compliance with rules adopted by the board pertaining to minimum capitalization and adequate public liability insurance; and

(f) It is currently licensed as required by s. 473.3101.

(3) A limited liability company may not engage in the practice of public accounting in this state unless:

(a) It is a limited liability company that is organized in this or any other state.

(b) Each member of the limited liability company is a certified public accountant in some state.

(c) At least one member of the limited liability company, and each member or manager domiciled in this state having authority over the practice of public accounting by the limited liability company, is a certified public accountant and holds an active license in this state.

(d) It is currently licensed as required by s. 473.3101.

(e) It is in compliance with rules adopted by the board pertaining to minimum capitalization and adequate public liability insurance.

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Fla. Stat. § 473.309 (1997)

473.309. Practice requirements for partnerships, corporations, and limited liability companies

(1) A partnership may not engage in the practice of public accounting in this state unless:

(a) It is a form of partnership recognized by Florida law.

(b) Partners owning at least two-thirds of the financial interest and voting rights of the partnership are certified public accountants in some state.

(c) At least one general partner is a certified public accountant of this state and holds an active license.

(d) All noncertified public accountant partners are engaged in the business of the partnership as their principal occupation.

(e) It is in compliance with rules adopted by the board pertaining to minimum capitalization and adequate public liability insurance.

(f) It is currently licensed as required by s. 473.3101.

(2) A corporation may not engage in the practice of public accounting in this state unless:

(a) It is a corporation duly organized in this or some other state.

(b) Shareholders of the corporation owning at least two-thirds of the financial interest and voting rights of the corporation are certified public accountants in some state and are principally engaged in the business of the corporation.

(c) The principal officer of the corporation is a certified public accountant in some state.

(d) At least one shareholder of the corporation is a certified public accountant and holds an active license in this state.

(e) All noncertified public accountant shareholders are engaged in the business of the corporation as their principal occupation.

(f) It is in compliance with rules adopted by the board pertaining to minimum capitalization and adequate public liability insurance.

(g) It is currently licensed as required by s. 473.3101.

(3) A limited liability company may not engage in the practice of public accounting in this state unless:

(a) It is a limited liability company *duly* organized in this or *some* other state.

(b) Members of the limited liability company owning at least two-thirds of the financial interest and voting rights of the company are certified public accountants in some state.

(c) At least one member of the limited liability company is a certified public accountant and holds an active license in this state.

(d) All noncertified public accountant members are engaged in the business of the company as their principal occupation.

(e) It is in compliance with rules adopted by the board pertaining to minimum capitalization and adequate public liability insurance.

(f) It is currently licensed as required by s. 473.3101.

(4) A partnership, corporation, limited liability company, or any other business entity is engaged in the practice of public accounting if its employees are engaged in the practice of public accounting.

Fla. Stat. § 473.3101 (1995)

473.3101 Licensure of partnerships, corporations, and limited liability companies. —

(1) Each partnership, corporation, or limited liability company seeking to engage in the practice of public accounting in this state must file an application for licensure with the department and supply the information the board requires. An application must be made upon the affidavit of a general partner, shareholder, or member who is a certified public accountant.

(2) The board shall determine whether the partnership, corporation, or limited liability company meets the requirements for practice and, pending that determination, may certify to the department the partnership, corporation, or limited liability company for provisional licensure.

(3) Each license must be renewed every 2 years. Each partnership, corporation, or limited liability company licensed under this

section must notify the department within 1 month after any change in the information contained in the application on which its license is based.

* * *

Fla. Stat. § 473.322 (1995)

473.322 Prohibitions; penalties. —

(1) A person may not knowingly;

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that the person holds an active license under this chapter, unless the person holds an active license under this chapter;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion that is intended or conventionally understood to convey an assurance of reliability as to matters not

specifically disclaimed unless such person holds an active license under this chapter. This paragraph does not prohibit the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon;

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof;

(f) Use or attempt to use a public accounting license that has been suspended, revoked, or placed on inactive or delinquent status;

(g) Employ unlicensed persons to practice public accounting;

(h) Conceal information relative to violations of this chapter; or

(i) Assume or use the title "board certified," unless such person holds a certificate of special competence issued by the board pursuant to s. 473.3145.

(2) Any person who violates any

provision of this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

* * *